Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-2055

Securities Investor Protection Corporation,
Petitioner,

v.

James C. Barbour, as Receiver for Guaranty Bond and Securities Corporation and Guaranty Bond Company, Inc.,
Respondent,

and

Securities and Exchange Commission,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

SECURITIES INVESTOR PROTECTION CORPORATION,
Petitioner,

v.

JAMES C. BARBOUR, AS RECEIVER FOR GUARANTY BOND AND SECURITIES CORPORATION AND GUARANTY BOND COMPANY, INC.,
Respondent,

and

SECURITIES AND EXCHANGE COMMISSION,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Securities Investor Protection Corporation respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Sixth Circuit entered on April 23, 1974.

Opinions Below

The opinion of the Court of Appeals, reported at 496 F.2d 145 (6th Cir. 1974), is printed as Appendix A hereto. The unreported opinion of the District Court is printed as Appendix C hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on April 23, 1974 (Appendix B hereto). By agreement of the parties, with the District Court's concurrence, no further proceedings will be taken pursuant to the mandate until this petition is determined. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

The Securities Investor Protection Act of 1970 ("Act") became effective December 30, 1970 ("Effective Date").[1] In part it created the Securities Investor Protection Corporation ("SIPC"), a non-profit membership corporation consisting of most broker-dealers ("Members"). The Act requires Members to pay assessments to SIPC. It also gives limited protection from SIPC's funds to Members' customers in the course of a liquidation proceeding which SIPC may commence against Members in appropriate cases (*e.g.* insolvency). The questions presented are:

1. Whether customers of a Member[2] have an implied private right of action to compel SIPC to meet its alleged obligations to them under the Act, despite Section 7(b) thereof which grants that right only to the Securities and Exchange Commission ("Commission")?

2. If such a right of action can be implied, whether a receiver of a Member has standing to maintain it?[3]

3. Whether SIPC can be compelled to initiate a liquidation proceeding under the Act where the broker-dealer has already been substantially liquidated in a receivership which involved several affiliated enterprises (not broker-dealers); where it is no longer possible to implement the Act substantially as Congress intended; where there is no demonstration that customers will ultimately suffer any loss; and where any possible loss would result from the imposition upon customers of some of the receivership expenses.

4. Whether the United States Constitution and the Tennessee long-arm statute permit *in personam* jurisdiction over SIPC by the mailing of process to its offices in Washington, D.C., solely because the Act exacts assessments from Tennessee broker-dealers and protects Tennessee residents, without any proof that SIPC has any place of business or is actually engaged in activities in Tennessee.

5. Whether a broker-dealer which, prior to the Act's Effective Date, was hopelessly insolvent and subject to the Commission's injunction action based on federal securities laws violations, is covered by the provisions of the Act if it engaged (although unlawfully) in securities transactions between the Effective Date and a few days subsequent when an injunction issued? If so, whether SIPC was denied due process when the Court of Appeals held the Act applies without affording SIPC an evidentiary hearing in the District Court upon its pleaded denial of such transaction of business.

Constitutional and Statutory Provisions Involved

Because of their length the following provisions of the Act which are involved are set forth in Appendix D hereto: Sections 3(a) and (b)(1), 4(a)-(d), 5, 6, 7(b), 9(a) and (c), and 12(1) and (3).[4] However, excerpts or summaries of some principal provisions are set forth below to facilitate the review of this petition.

> "Notice to SIPC.—If the Commission or any self-regulatory organization is aware of facts which lead it to believe that any broker or dealer subject to its regulation is in or is approaching financial difficulty, it shall immediately notify SIPC, and, if such notification is by a self-regulatory organization, the Commission." Section 5(a)(1)

> "Action by SIPC.—If SIPC determines that any member has failed or is in danger of failing to meet its obligations to customers and that there exists one or more of the conditions specified in subsection

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[1] 15 U.S.C. § 78aaa *et seq.*

[2] Whether the broker-dealer involved here was a member is also an issue.

[3] This question and those designated as number 5 are not discussed as Reasons For Granting the Writ. They are stated to preserve them if this petition is granted.

[4] 15 U.S.C. §§ 78ccc(a) and (b)(1), 78ddd(a)-(d), 78eee, 78fff, 78ggg(b), 78iii(a) and (c), and 78*lll*(1) and (3).

> (b)(1)(A) of this section, SIPC . . . may apply . . . for a decree adjudicating that customers of such member are in need of the protection provided by this chapter." Section 5(a)(2)
>
> Liquidation Proceedings.—Section 6 provides that a proceeding commenced by SIPC is a liquidation proceeding. It states the purposes of the proceeding and in great detail sets forth the powers and duties of the liquidating trustee, the extent to which the Bankruptcy Act applies, SIPC's obligations and rights of subrogation and recoupment, monetary limits upon the protection available to customers from SIPC's funds, definitions of persons entitled and not entitled to that protection, and numerous other procedural and substantive provisions.
>
> "Enforcement of actions.—In the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member of SIPC, the Commission may apply to the district court of the United States in which the principal office of SIPC is located for an order requiring SIPC to discharge its obligations under this chapter and for such other relief as the Court may deem appropriate to carry out the purposes of this chapter." Section 7(b)
>
> "General assessment authority.—SIPC shall . . impose upon its members such assessments as . . . SIPC may deem necessary and appropriate. . ." Section 4(c)(2)
>
> "Collecting agent.—Each self-regulatory organization shall act as collection agent for SIPC to collect the assessments . . . and members of SIPC who are not members of any self-regulatory organization shall make payment direct to SIPC." Section 9(a)

Also involved are the Tennessee long-arm statute (Tenn. Code Ann. § 20-235), and the due process clause of the Fifth Amendment to the United States Constitution. U. S. Const. amend. V. These are set forth in Appendix E hereto.

Statement of the Case

Prior Critical Proceedings

Guaranty Bond and Securities Corporation ("Guaranty Bond") was registered with the Commission as a broker-dealer on the Act's Effective Date. Prior thereto the Commission had commenced an injunction action in the District Court, Middle District of Tennessee, against Guaranty Bond, its principals, and its parent Guaranty Bond Company, Inc. ("Parent"). The Commission's allegations included Guaranty Bond's longstanding violations of the Commission's Rule 15c3-1 ("Net Capital Rule").[5] On January 6, 1971 the District Court granted a preliminary injunction, and on January 27, 1971 it appointed James C. Barbour as Receiver for Guaranty Bond and its Parent.

Guaranty Bond's 1970 Insolvency. Guaranty Bond's hopeless insolvency and substantial violations of the Net Capital Rule before the Act's Effective Date are adjudicated and uncontrovertible facts.

The Receivership. Subsequent orders of the District Court establish among other things that by the end of May 1971, when SIPC first learned of the Guaranty Bond situation, the receivership had been expanded to include various other enterprises (not broker-dealers) affiliated with Guaranty Bond and its Parent;[6] the Receiver's liquidation of Guaranty Bond and affiliates was substantially completed; the insurance business of one affiliate had been sold off to the wife of one of Guaranty Bond's principals; and all securities (more than 15 million dollars worth) had been returned to their owners.

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[5] The Commission had calculated that as of September 30, 1970 Guaranty Bond had a net capital deficit of almost 3½ million dollars.

[6] General Insurance Underwriters, Inc. (a division of Guaranty Bond's Parent), Church Building Associates, Inc., Religious Institutional Finance Corporation of America, and two partnerships of Guaranty Bond's principals known as Huey & Huey, and Huey Brothers Joint Tenants. Guaranty Bond's principal business was arranging financing for church construction via underwritings of church bonds.

Liability of Principals. The District Court made extensive findings of fraudulent, dishonest and manipulative conduct by Guaranty Bond's principals and cited their admissions of siphoning earnings from Guaranty Bond to its Parent and wrongfully taking secret profits. To date the Receiver has taken no action against them.

SIPC's Decision Not To Intervene. SIPC first learned of the Guaranty Bond situation when it received a letter dated May 27, 1971 from the Receiver's counsel requesting "protection under the Act".[7] SIPC declined to intervene because of the status, scope and progress of the receivership, and because both Guaranty Bond's hopeless insolvency and the Commission's action occurred before the Act's Effective Date.

Receiver's Enforcement Proceeding

The Receiver's instant proceeding was commenced in April 1972 by petition and an order of the District Court directing the Commission and SIPC to show cause "... why the remedies afforded by the Act should not be made available in this proceeding." A copy of that order was mailed to SIPC at its offices in Washington, D. C. The Receiver alleged no basis for the District Court's jurisdiction except one intended to support *in personam* jurisdiction over SIPC[8] which had not been a party to the Commission's action or the receivership. SIPC and the Commission served answers to the Receiver's Petition.

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[7] The Receiver admits his awareness of the Act "shortly after his appointment" four months earlier. His order of appointment directed him to recommend to the Court "... appropriate steps to be taken to protect . . . creditors and other persons dealing with" Guaranty Bond and its Parent.

[8] The Petition alleged: "SIPC is subject to the jurisdiction of this Court because it is engaged in business in the Middle District of Tennessee in that it collects assessments under the Act from broker-dealers operating in this District."

Receiver's Petition. The Receiver alleged generally that Guaranty Bond transacted a securities business until January 6, 1971, and that its customers were "entitled to the protection of the Act". He acknowledged, however, that customers had received their bonds and credit balances and that their losses (if any) would result from a court-ordered deposit by customers equal to five percent of the principal amount of their bonds in order to defray part of the receivership expenses. A portion of that deposit has since been refunded.

SIPC's Answer. SIPC denied that Guaranty Bond transacted business until January 6, 1971 or that its customers were in need of the Act's protection. It also alleged seven affirmative defenses which, in substance, denied that the petition stated a claim upon which relief could be granted; challenged the District Court's jurisdiction over SIPC; denied that the Act applied to Guaranty Bond, as a result of the Commission's action and the insolvency and Net Capital Rule violations before the Act's Effective Date;[9] and further alleged that SIPC's refusal to intervene under the circumstances of the receivership was either required by the Act or was a proper exercise of its discretion.

District Court's Opinion

The District Court rendered its decision solely on the basis of the pleadings. It first held that the exercise of *in personam* jurisdiction over SIPC was consistent with due process of law [citing *International Shoe Co.* v. *State of Washington,* 326 U.S. 310 (1945) and *McGee* v. *International Life Insurance Co.,* 355 U.S. 220 (1957)] and the single-act Tennessee long-arm statute (TENN. CODE ANN.

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[9] The Commission's answer stated the view that the Act should be applied to Guaranty Bond if it transacted business after the Act's Effective Date. However it also stated, in substance, that SIPC's intervention would be needed only if customers actually sustained losses, which had not been demonstrated since the Receiver might have causes of action against Guaranty Bond's principals which would benefit customers.

§ 20-235). Based solely on the Act's provisions the Court reasoned that "the execution of these statutory activities [protection of customers and receipt of assessments] anticipates a continuing relationship between SIPC and its members and customers" in Tennessee. The District Court also sustained its subject matter jurisdiction and the Receiver's standing to maintain this "enforcement action" stating, in part, that ". . . the default or neglect of the Commission to institute enforcement proceedings under § 7(b) should give rise to a similar cause of action by a receiver in behalf of a member's customers."[10] However, the Court dismissed the Receiver's proceeding on the ground that the Act was not intended to apply to broker-dealers such as Guaranty Bond who were hopelessly insolvent or in substantial violation of the Net Capital Rule before the Act's Effective Date.

Court of Appeals' Opinion

The Court of Appeals sustained *in personam* jurisdiction over SIPC on the opinion of the District Court. It also inferred from the Act that customers of a Member have a right to bring an "enforcement action" against SIPC. It did so by a process of construction based solely on "the lack of express language of exclusivity in providing for an enforcement action by the S.E.C., coupled with a general provision allowing for suits against the S.I.P.C." The Court cited no supporting legislative history or rule of construction. No other Court of Appeals has decided this point but a contrary result was reached in *Bohart-McCaslin Ventures, Inc.* v. *Midwestern Securities Corp.,* 352 F. Supp. 937 (N.D. Tex. 1973).

The Court further held that the Receiver has standing to maintain an "enforcement action" in light of (i) the aforesaid "lack of express language of exclusivity" and (ii) its conclusion that the Receiver meets the tests enunciated in *Sierra Club* v. *Morton,* 405 U.S. 727 (1971), and *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150 (1970).

The Court of Appeals reversed the District Court and held that despite its financial collapse in 1970 the Act applied to Guaranty Bond because it was allegedly ". . . in fact, a broker or dealer at the effective date of the Act." This conclusion was premised on a statement by the District Court that Guaranty Bond "handled 101 transactions" in 1971 before it was enjoined on January 6th. Whether it did was denied by SIPC and has not been established by evidence in this proceeding.

The Court of Appeals remanded "for proceedings consistent with this opinion and specifically to determine and enforce any rights of Guaranty's customers under the S.I.P.A." It did not specify how the Act should be implemented, but its mandate must be viewed as a summary rejection of SIPC's affirmative defenses and arguments based upon the impossibilty of applying the Act in this case as the Act provides and as Congress intended. The District Court did not reach that question.

Summary of the Act

The Act has not yet been reviewed by this Court.[11] An understanding of the purposes and general operation of the Act is essential to an appreciation of the issues and their importance which leads SIPC to seek this Court's consideration.

The securities industry encountered serious financial difficulties in the late 1960's. Public investor confidence waned. To bolster that confidence Congress adopted the Act which created a new federal program with these purposes:

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[10] There was no proof of default or neglect by the Commission.

[11] Petitions for certiorari by parties other than SIPC were denied in *Alan F. Hughes, Inc.* v. *Securities & Exchange Commission,* 414 U.S. 1092 (1973), and *Seligsohn* v. *Securities & Exchange Commission,* 414 U.S. 1111 (1973).

> ". . . to protect individual investors from financial hardship; to insulate the economy from the disruption which can follow the failure of major financial institutions; and to achieve a general upgrading of financial responsibility requirements of brokers and dealers to eliminate, to the maximum extent possible, the risks which lead to customer loss."[12]

The Act accomplished these purposes essentially by two methods. First, it enhanced the Commission's powers to establish financial responsibility rules for broker-dealers[13] and to impose on the self-regulatory organizations[14] requirements for the financial examination of their members.[15] As the Court knows the securities industry is self-regulated, subject to the Commission's rulemaking and enforcement powers. Second, it created SIPC which it empowered to commence proceedings for the liquidation of its members whose financial condition poses the threat of loss to their customers ("Liquidation Proceeding"). Congress placed responsibility for its new program on the Commission, SIPC and the industry's self-regulatory organizations.

SIPC is not an insurance company. It was conceived[16] and created as a private, non-profit, industry-funded membership corporation[17] which would work within the self-regulatory structure. Its Board consists of five persons appointed by the President and confirmed by the Senate, and two designated respectively by the Federal Reserve Board and the Secretary of the Treasury.[18] As earlier noted most broker-dealers are required to be SIPC members and to pay assessments to SIPC.[19] If SIPC's funds should be inadequate to carry out its purposes the Act authorizes a loan of up to one billion dollars from the United States Treasury.

Prompted in part by the availability of United States funds,[20] the Congress granted the Commission extensive supervisory power over SIPC. Those powers include approval of SIPC's bylaws and rules, certain financial decisions involving SIPC's credit and funds, and effective control over matters relating to the borrowing and repayment of United States funds.[21] Additionally the Commission is empowered to adopt rules adjusting certain provisions of the Act relating to the protection of customers, and to determine the Act's applicability to the foreign operations of SIPC members.[22] SIPC is required to make annual reports of its operations to the Commission which the Commission is obliged to transmit to the President and the Congress with such comments as it deems appropriate.[23]

SIPC's authority to commence a Liquidation Proceeding for the protection of customers is an important segment of the Act's program.[24] This potent responsibility also has aspects of enforcement. Thus, the Act authorizes liquidation of a SIPC Member which is not in compliance with applicable requirements under the Securities Exchange Act of 1934. or rules of the Commission or a self-regulatory organization, with respect to financial responsibility or hypothecation of customer's securities.[25] It is even permitted if a Member cannot make the computations necessary to establish such compliance.[26] If these or other specified conditions exist (*e.g.,* insolvency),[27] and if SIPC determines that a Member "has failed or is in danger of failing to meet its obligations to its customers," SIPC "may" commence a Liquidation Proceeding.[28] Whether it does depends upon its exercise of the broad discretion granted it.[29] At this writing 105 SIPC Members have been placed in liquidation under the Act and their customers have been protected.

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[12] S.REP. No. 91-1218, 91st Cong., 2d Sess. 4 (1970) ("Senate Report"), see also H.R.REP. No. 91-1613, 91st Cong., 2d Sess. 1 (1970) ("House Report").

[13] Section 7(d), 15 U.S.C. § 78ggg(d). Citations to the Act as reported in the United States Code will not repeat 15 U.S.C.

[14] Defined in Section 12(1), § *78lll*(1), "self-regulatory organizations" currently consist of national securities exchanges and the National Association of Securities Dealers, Inc.

[15] Section 9(f), § 78iii(f). Similarly SIPC is given responsibility to work with the self-regulatory organizations toward the standardization of their examining procedures and the development of procedures for the early detection of approaching financial difficulty of SIPC members. Section 9(e), § 78iii(e).

[16] Hearings on S. 2348, S. 3988, S. 3989 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 91st Cong., 2d Sess., 231-233, 271-272 (1970). Hearings on H.R. 13308, H.R. 17585, H.R. 18081, H.R. 18109, H.R. 18458 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess., 199 *et seq.*, 365 (1970). These hearings will hereinafter be cited as "Senate Hearings" and "House Hearings." See also House Report at 11-13.

[17] Sections 3(a) and 4, §§ 78ccc(a) and 78ddd.

[18] Section 3(c), § 78ccc(c).

[19] Sections 3(a)(2) and 4(c), §§ 78ccc(a)(2) and 78ddd(c).

[20] Senate Hearings at 243; House Hearings at 219-220, 345.

[21] Sections 3(e)(2)-(3), 4(d)(2)(B), 4(e)(1) and 4(f)-(g); §§ 78ccc(e)(2)-(3), 78ddd(d)(2)(B), 78ddd(e)(1), and 78ddd(f)-(g).

[22] Sections 6(c)(2)(C)(iii), 6(d)(1) and (2), and 11(b); §§ 78fff(c)(2)(C)(iii), 78fff(d)(1) and (2), and 78kkk(b).

[23] Section 7(c)(2), § 78ggg(c)(2).

SIPC has no authority to examine its Members. It depends for its information on the self-regulatory organizations and the Commission. The Act requires them to notify SIPC immediately when they believe that any broker-dealer subject to their regulation is in, or is approaching, financial difficulty.[30] Because violations of the federal securities laws are invariably involved, in most cases SIPC commences its proceeding simultaneously with, or immediately after, an injunction action commenced by the Commission against the Member. The Act permits SIPC to combine its Liquidation Proceeding with any action brought by the Commission, and

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[24] House Hearings at 219-220.

[25] Sections 5(a)(2), 5(b)(1)(A); §§ 78cee(a)(2), 78eee(b)(1)(A).

[26] *Id.*

[27] *Id.*

[28] Note 25, *supra.*

[29] Senate Report at 11; House Hearings at 200, 236-237, 331-333; 340-341; Senate Hearings at 259-260.

[30] Section 5(a)(1), § 78eee(a)(1).

it also authorizes the Commission to appear and participate as a party in a Liquidation Proceeding.[31]

SIPS does not itself liquidate its members. It is merely authorized to commence a Liquidation Proceeding in the appropriate federal district court. The Member involved is entitled to contest SIPC's allegations.[32] Where the Member consents or SIPC prevails, the court is required to appoint persons designated by SIPC to serve as trustee and counsel[33] to carry out the purposes of the Liquidation Proceeding which is governed by the Act and certain provisions of the Bankruptcy Act.[34] A Liquidation Proceeding is exceedingly complex.[35] In the course thereof SIPC's funds provide limited protection to the Member's customers (discussed *infra,* p. 21).

Reasons for Granting the Writ

I.

The Proper Construction of Section 7(b) of the Act is an Important Novel Federal Question Which Should be Settled by this Court and Which the Court of Appeals Decided in a Way in Conflict With Controlling Principles Established by Decisions of this Court.[36]

A. Section 7(b) is Critically Important to the Proper Implementation of the Act, to the Securities Industry, and to the Commission's Responsibility to Enforce the Federal Securities Laws.

There is only one means whereby SIPC's funds may be used to protect the investing public, namely, a Liquidation

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[31] Sections 5(a)(3)(A), 5(c); §§ 78eee(a)(3)(A), 78eee(c).

[32] Section 5(b)(1)(B); § 78eee(b)(1)(B).

[33] Section 5(b)(3); § 78eee(b)(3).

[34] Section 6(c)(1); § 78fff(c)(1).

[35] Duffy, "Reforming SIPC," 7 The Rev. of Sec. Leg. 985, 990 (1974).

[36] A further consideration is the conflict between the decision below and *Bohart-McCaslin Ventures, Inc.* v. *Midwestern Securities Corp.,* 352 F.Supp. 937, 940 (N.D. Tex. 1973). See *United States* v. *Constantine,* 296 U.S. 287, 290-291 (1935).

Proceeding commenced by SIPC. By enacting Section 7(b) the Congress granted the Commission the extraordinary discretionary right to bring a mandatory injunction action to require SIPC to commence a Liquidation Proceeding, notwithstanding the contrary exercise of SIPC's judgment. That right is extraordinary for two reasons. First, it permits judicial review of a discretionary corporate decision. Second, it entitles a party to compel the commencement of a legal proceeding by another. That enforcement action is a powerful supervisory instrument which the Congress entrusted to the Commission's expertise, discretion and sense of public responsibility. Section 7(b) is a consistent extension of the Commission's supervisory role over SIPC in other important matters.

The decision to commence a Liquidation Proceeding frequently involves sophisticated judgments upon complex financial facts and applicable rules and regulations. SIPC necessarily makes such determinations in close cooperation with the Commission and the self-regulatory organizations. In many cases it is immediately clear that a Liquidation Proceeding is necessary. In many others forebearance allows time for other viable solutions such as the infusion of new capital, the transfer of accounts to a healthy firm, or the self-liquidation, merger or acquisition of the troubled firm. Despite the existence of bases upon which a Liquidation Proceeding could be commenced such solutions, not uncommon in this troubled economy, are decidedly in the public interest and are encouraged by the self-regulatory organizations, the Commission and SIPC.

To infer that the investing public possesses an enforcement right parallel to the Commission's, where the Commission in its discretion does not sue SIPC, would add another extraordinary layer of supervision of even broader scope. Did Congress intend *sub silentio* to give the general public the right to substitute its judgment for SIPC's *and* the Commission's, and to obtain judicial review of the important and delicate determinations which the Congress specifically entrusted to them alone? Did Congress intend *sub silentio* to vest the general public with the unique right to compel a corporation to commence a judicial proceeding, particularly one with the impact of a Liquidation Proceeding, or to compel the commitment of funds of SIPC and the United States despite contrary determinations by SIPC and the Commission? Recognition of such rights is inconsistent with the clear design of the Act, and further would open the door to other serious adverse consequences.

It is, of course, impossible to measure the impact of an implied private right of enforcement in terms of the number of actions which might be commenced. Much would depend upon the state of the economy. But should the door be opened at all to private actions which (i) could frustrate the viable alternatives to a Liquidation Proceeding mentioned above; (ii) could be enough, by reason alone of the allegations made, to start a fatal run on a firm in a fragile but not terminal financial condition; (iii) might very well interfere with the Commission's investigative or enforcement activities in a given case; (iv) could be commenced on grounds other than those for involuntary petitions under the Bankruptcy Act; (v) could be commenced by a bad faith customer, including a competitor of the subject firm; (vi) might compel a firm, perhaps in marginal financial circumstances, to devote resources to a defense or at least a burdensome involvement in the action against SIPC; and (vii) could take the form of a class action with all its attendant difficulties? Recognition of a private right of action is pregnant with far more hazards, not susceptible of precise forecasting, than any benefit likely to result.

The decision of the Court of Appeals, if allowed to stand and if followed by other Courts, paves the way for incalculable damage to the orderly plan of the Act, members of the securities industry, and even the enforcement activities of the Commission. It presents a question which is appropriate for review by this Court.

B. The Court of Appeals Seriously Misconstrued Section 7(b) by Failing to Apply Principles of Construction Firmly Established by this Court.

Because Congress did not add words of exclusivity to Section 7(b), the Court of Appeals inferred a congressional intent to imply a private enforcement action from SIPC's right, included among SIPC's enumerated general powers, to sue and be sued, complain and defend, in its own name and through its own counsel in any federal or state court.[37] In so holding the Court of Appeals failed to follow the clearly applicable rule of construction *expressio unius est exclusio alterius* and the well-settled principle of exclusivity where a federal statute protects a public right by granting a specific remedy to an independent agency of the federal government. *Nat'l R.R. Passenger Corp.* v. *Nat'l Ass'n of R.R. Passengers,* 414 U.S. 453 (1974); *Switchmen's Union of North America* v. *Nat'l Mediation Board,* 320 U.S. 297 (1943); *Botany Worsted Mills* v. *United States,* 278 U.S. 282, 289 (1929); *Holloway* v. *Bristol-Myers Corp.,* 485 F.2d 986 (D.C. Cir. 1973); *Ash* v. *Cort,* 496 F.2d 416 (3d Cir. 1974) (dictum), *petition for cert. filed,* 42 U.S.L.W. 3703 (U.S. June 20, 1974) (73-1908).[38] The Court of Appeals also failed to apply the equally well-settled rule that a statutory provision which deals specifically with a matter will not be enlarged by reason of a gen-

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[37] Section 3(b)(1), § 78ccc(b)(1).

[38] See also *Bass Anglers Sportsman's Soc.* v. *U.S. Steel Corp.,* 324 F.Supp. 412, 415 (S.D., M.D. & N.D. Ala.), *aff'd,* 447 F.2d 1304 (5th Cir. 1971); *Jacklovich* v. *Interlake, Inc.,* 458 F.2d 923 (7th Cir. 1972); *Connecticut Action Now, Inc.* v. *Roberts Plating Co., Inc.,* 457 F.2d 81 (2d Cir. 1972); *Bass Anglers Sportsman's Soc.* v. *U.S. Plywood-Champion Papers, Inc.,* 324 F. Supp. 302 (S.D. Tex. 1971).

eral provision in the same statute. *Continental Cas. Co.* v. *United States,* 314 U.S. 527, 533 (1942); *Ginsberg & Sons* v. *Popkin,* 285 U.S. 204, 208 (1932).[39] Of the numerous applicable precedents it seems necessary only to discuss this Court's decision in the *Nat'l R.R. Passenger Corp.* case, *supra* (the "Amtrak" case) which, especially in light of its facts, seems controlling.

In *Amtrak* this Court reviewed Section 307(a) of the Amtrak Act which authorizes the federal district courts, upon petition of the Attorney General, to restrain violations of duty by Amtrak in its administration of the Amtrak Act. Section 307(a) uses no words of exclusivity. Amtrak was made subject to the District of Columbia Business Corporation Act,[40] Section 29-904(b) of which makes Amtrak generally amenable to suit. Nevertheless, this Court refused to infer a private right of action to restrain Amtrak's violation of its very broad statutory responsibilities. Viewing Section 307(a) as creating "a public cause of action" maintainable by the Attorney General, this Court held that the maxim *expressio unius est exclusio alterius* required the conclusion that the Attorney General's remedy is exclusive in the absence of "clear contrary evidence of legislative intent." In reaching its determination this Court noted with some emphasis that to infer a private right of action would produce results inconsonant with Congress' plan to provide an "efficient apparatus" to carry out the purposes of the Amtrak Act.[41] It also noted (at

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[39] See also *United States* v. *Giordano,* 469 F.2d 522, 529 (4th Cir. 1972), *aff'd,* 94 S.Ct. 1820 (1974); *Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *United States,* 312 F.2d 214, 220 (1st Cir. 1963); *Service Life Insurance Company* v. *United States,* 293 F.2d 72, 76, 77 (8th Cir. 1961); *SEC* v. *Long Island Lighting Co.,* 148 F.2d 252 (2d Cir. 1945).

[40] 45 U.S.C. § 541.

[41] Referring to the line of cases which have inferred a private right of action [citing *J. I. Case* v. *Borak,* 377 U. S. 426 (1964)], this Court emphasized that a private right could not be inferred unless ". . . consistent with the evident legislative intent and . . . the effectuation of the purposes intended to be served by the Act." (at 457-458).

464 n. 12) Amtrak's statutory duty to make periodic reports of its operations to the Congress and the President, a factor which it thought enabled Congress to believe that the exclusive remedy given the Attorney General would be effective.

The *Amtrak* rational would seem *a fortiori* to require a reversal in this case. The Act vests the exclusive enforcement right in a government agency upon which Congress conferred other important supervisory powers over SIPC. In further contrast to the Attorney General's less proximate involvement with Amtrak's operations, the Commission by reason of its enforcement activities is preforce privy to every situation in which SIPC might have a responsibility. Indeed, the Commission is obliged to notify SIPC of the possible failure of a broker-dealer, and the self-regulatory organizations must make such reports to the Commission as well as SIPC.[42] Unlike Amtrak, SIPC is a nonprofit corporation whose duty to the public cannot be affected by a profit motive. Like Amtrak, SIPC's annual reports of its operations are transmitted to the President and to Congress. Indeed they are accompanied by the Commission's comments. SIPC's board of seven includes two representatives of the federal government whereas Amtrak's board of seventeen includes only one. Like the Amtrak Act, express words of exclusivity do not appear in Section 7(b) and SIPC is generally amenable to suit. And finally, it is clear that recognition of a private enforcement action would be inconsistent with the scheme and purposes of the Act. It should be observed that even the reasons given by Mr. Justice Douglas in his dissent in *Amtrak* appear inapplicable to the Act, and that the grounds upon which he distinguished the *Switchmen's Union of North America* case, *supra,* do not obtain here.

To the foregoing may be added these comments. Section 7(b) is entitled "Enforcement of Actions" and Section 7

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[42] Section 5(a)(1), § 78eee(a)(1).

itself is entitled "SEC FUNCTIONS". Although not controlling, these titles tend to support the conclusion of exclusivity. In addition, Section 7(b) requires the Commission to sue in the District Court where SIPC's principal office is located, a requirement that could require suit in Los Angeles if SIPC thought it appropriate to locate there. Designed for SIPC's convenience, this provision tends to negate a congressional intent to imply a private right of action which might be brought anywhere if jurisdictional bases existed. There is no legislative history which would require the applicable rules of construction to yield. Examination of the congressional hearings, reports and floor remarks fails to reveal any specific comments on the exclusivity of Section 7(b) or any counterpart in predecessor bills.[43] What can be gleaned, as noted earlier, is a Congressional insistence on substantial Commission supervision over SIPC.

The Court of Appeals clearly erred when it inferred a private right of action from a provision which at most makes SIPC amenable to suit but does not purport to establish any substantive rights which might be asserted against it. The lack of words of exclusivity in Section 7(b) was erroneously regarded as a sufficient indicator of a private right of action. The decision below is in direct conflict with the *Amtrak* case and numerous other applicable precedents. It should be reversed. The holding in *Bohart-McCaslin Ventures, Inc.* v. *Midwestern Corp.*, 352 F.Supp. 937 (N.D. Tex. 1973) was correct.

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[43] The following portions of legislative history support exclusivity. First, the House Report stated (at 22): "Section 7(b) of the bill provides that, should SIPC refuse to commit its funds or otherwise act for the protection of customers of any member, the Commission could apply to a court for an order requiring SIPC to discharge its obligations under this legislation or for such other relief as the court may deem appropriate to carry out the purposes of the legislation—for example, requiring SIPC to file an application under section 5."

Second, the Senate Report stated (at 15): "*Section 35(p)* [Senate counterpart of Section 7(b)] accords the Commission the power to apply to a District Court for an order in the nature of a mandatory injunction in the unlikely event that the Corporation refuses to carry out its duties."

Third, the Act evolved from a bill prepared jointly by the Commission and representatives of the securities industry. Each had previously submitted separate bills. The bill submitted by the industry contained no provision for an enforcement action by the Commission or anyone (House Hearings at 57). The Commission's bill provided for enforcement by the Commission in a section which also granted the Commission the power to approve SIPC's bylaws (House Hearings at 35, 53).

II.

The Court of Appeals' Summary Rejection of SIPC's Defenses Based Upon the Impossibility of Fulfilling the Act's Purposes as a Result of the Receivership Raises Questions of Critical Importance to SIPC's Authority and the Proper Implementation of the Act.

The Court of Appeals directed the District Court "to determine and enforce any rights of Guaranty's customers under the S.I.P.A." (Appendix-10).[44] Under the circumstances that determination amounts to making SIPC a mere indemnitor of the customers' share of the Receiver's fee and expenses. The Court's action constituted a summary dismissal, without benefit of proof, of SIPC's two affirmative defenses based on the substantially completed status of the receivership and the resulting impossibility of implementating the Act even substantially as Congress intended.[45] That determination substitutes the judicial apparatus and discretion for the plain design of the Act and SIPC's discretion and role thereunder. Whatever may be the appeal of such a pragmatic result, it raises fundamental questions of vital importance to the administration of the Act.

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[44] The Court of Appeals discussed only the threshold question of the Act's applicability (Question 5, *supra* at 3) which this petition reserves (n. 3 *supra*).

[45] The first defense alleged that under the circumstances SIPC lacked authority under the Act to take any action thereunder. The second alleged that SIPC's refusal to take action was a proper exercise of its corporate discretion which should not be superseded by judicial action.

The Act provides for ". . . the prompt and orderly liquidation of SIPC members when required."[46] Section 6 contains detailed procedural and substantive provisions which determine the rights of customers and SIPC. Some are summarized below[47] but there are many others (Appendix D-9 *et seq.*). As that summary shows, the Act does not attempt to make all customers whole. It established a plan of limited protection via a carefully delineated liquidation proceeding. It contemplates that customers' claims will be satisfied to the maximum extent possible from the assets already on hand with the Member. SIPC's funds merely supplement those assets within the limits and in the manner provided by the Act. The scope of customer protection and SIPC's exposure depend upon adherence to the statutory scheme which includes correct identification of protected customers, the proper determination of their net equities, the valuation of their securities as of the "filing date" regardless of subsequent changes in value, the prorata distribution of securities when required, the enforcement of SIPC's rights of recoupment and subrogation, the avoidance of preferential transfers and the vigorous pursuit of recoveries against a Member's principals and employees as well as third parties.

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[46] House Report at 9; see also Senate Hearings at 303.

[47] The term "customer" is defined in great detail [Section 6(c)(2)(A)(ii); §78fff(c)(2)(A)(ii)]. Such customers are entitled to the return of their specifically identifiable property, as defined [Sections 6(c)(2)(C), 6(c)(2)(A)(i); §§78fff(c)(2)(C), §§78fff(c)(2)(A)(i)]. All customers' property (except specifically identifiable property) constitutes a single and separate fund (the "Fund") for the benefit of customers [Section 6(c)(2)(B); §78fff(c)(2)(B)]. Customers are entitled to share prorata in the Fund, based on the value of the "net equity" of their accounts (excluding specifically identifiable property) as of the "filing date" [Sections 6(c)(2)(A)(iv), 5(b)(4)(B); §§78fff(c)(2)(A)(iv), 78eee(b)(4)(B)]. If the Fund is insufficient to satisfy all customers' net equities the balance of their claims share in the general estate with general creditors [Section 6(c)(2)(B); §78fff(c)(2)(B)]. Customers are protected by SIPC's funds only to the extent their net equities cannot be satisfied from the "Fund" and the general estate, and then only up to $50,000 per customer of which only $20,000 is available for cash claims [Section 6(f)(1); §78fff(f)(1)]. In determining the unsatisfied amount of net equities,

In short, Congress established a definitive method through which it authorized and limited the protection of customers as well as the use, for that purpose, of funds of SIPC and the United States Treasury. In doing so it specifically granted SIPC the discretion to determine when those funds should be committed, subject to a possible enforcement action by the Commission. The decision of the Court of Appeals substantially defeats the manifest intent of Congress. It violates the fundamental principle that legislation may not be made to operate in a manner substantially different than prescribed by Congress [*United States* v. *Sisson,* 399 U.S. 267, 298 (1970); *Perry* v. *Commerce Loan Co.,* 383 U.S. 392, 400 (1966)] as well as the most rudimentary principles limiting judicial review of corporate action.

SIPC's defenses involve more than allegations. They are predicated upon the District Court's record of the receivership, including that Court's orders, which may be judicially noticed. See *Landy* v. *Federal Deposit Insurance Corporation,* 486 F.2d 139, 151 (3d Cir. 1973), *cert. denied,* 94 S. Ct. 1979 (1974). Moreover, there is no serious dispute that those defenses arose from a situation which SIPC was unable to alter or prevent. Neither the receiver nor the Commission has countered SIPC's documented allegation that it had no notice or knowledge of the Guaranty Bond difficulties until the end of May, 1971. The action of the Court of Appeals in rejecting these defenses without discussion so thoroughly eviscerates the Act and SIPC's corporate role thereunder as to present a question of the utmost importance to the proper implementation of the Act.

The implications of the decision below reach beyond its effect as precedent. It is likely that the Court's error resulted from its desire to supply some sort of financial help to make Guaranty Bond's customers whole. That is a phenomenon which frequently occurs when a source of funds seems available to relieve persons of the burden of financial loss. It cannot be gainsaid that other courts, particularly in light of the decision below, may respond to the same sympathies and reach for solutions at considerable variance from the Act. The Act is new and unfamiliar to many lawyers and judges. It would be an understatement to say there are many misconceptions concerning the nature of the protection provided by the Act. Many mistakenly equate it with insurance. It is respectfully submitted that this case, even recognizing its unusual factual characteristics, offers a vehicle which could be utilized by this Court to make an appropriate helpful expression upon the purposes of the Act and the manner in which it is intended by Congress to work. The uncertainties created by the decision below on the fundamental questions of the scope of SIPC's discretion under the Act, the scope of judicial review and the proper implementation of the Act plainly carry the potential for serious disruption of the program expressed in the Act. Those questions should not be left unsettled.

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securities returned in partial satisfaction of securities claims are valued as of the "filing date" regardless of actual value at time of distribution [Section 6(c)(2)(B); §78fff(c)(2)(B)]. Certain customers (specified insiders of the Member, banks and broker-dealers) are entirely excluded from SIPC protection [Sections 6(f)(1)(C) & (D); §§78fff(f)(1)(C) & (D)]. SIPC's funds are intended only to augment the Member's estate within prescribed limits. Thus SIPC's advance of funds to customers subrogates it to their rights against the Fund and the general estate [Section 6(f)(1); §78fff(f)(1)]. Although SIPC is authorized to advance funds for administrative expenses it enjoys a priority right of recoupment from the Member's estate [Sections 6(c)(2)(B), 6(f)(2); §§78fff(c)(2)(B), 78fff(f)(2)].

III.

The Exercise of *In Personam* Jurisdiction Over SIPC Raises an Important Question of Due Process of Law Which the Court of Appeals Decided in a Way in Conflict With Controlling Decisions of this Court.

The courts below sustained *in personam* jurisdiction over SIPC upon a novel theory.[48] There was no evidentiary hearing or proof by affidavit. On the basis of the Act alone, it was reasoned that a "relationship" existed between SIPC and Guaranty Bond's customers arising from the Act's general remedial purposes and its imposition of mandatory assessments upon Members as a funding device. That rationale conflicts with this Court's decisions in *International Shoe Co.* v. *State of Washington*, 326 U.S. 310 (1945), *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957), and *Hanson* v. *Denckla*, 357 U.S. 235 (1958).

The cited cases establish that *in personam* jurisdiction cannot constitutionally be exercised over a non-resident foreign corporation unless it has "minimum contacts" or "activities" in the forum state. The critical test enunciated in *International Shoe* was restated as follows in *Hanson* v. *Denckla* (at 253):

> "The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purpose fully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

International Shoe emphasized that whether due process is satisfied turns on qualitative rather than quantitative or mechanical evaluations of activity (at 319), and that the

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[48] Jurisdiction was based on the Tennessee long-arm statute. Tenn. Code Ann. § 20-235. As a result of a 1972 amendment, it permits the exercise of jurisdiction over non-residents ". . . as to any action or claim for relief arising from: . . . (f) Any basis not inconsistent with the Constitution of this state or of the United States."

required scope and quality of activity depends upon whether the liability asserted arises therefrom or is "unrelated" thereto (at 317-318). More substantial activity is required to establish sufficient "presence'" in the forum state to support jurisdiction for a cause of action not arising from an act committed in the forum state (at 318). *Hanson* v. *Denckla* stressed that due process limitations not only guarantee immunity from distant litigation but "are a consequence of territorial limitations on the power of the respective States" (at 251).[49]

There is no proof whatever that SIPC was engaged in any activities in Tennessee, substantial or otherwise, within the meaning of this Court's decisions. It is undisputed that SIPC's sole offices are located in Washington, D.C. SIPC is not a Tennessee corporation. Activity in Tennessee, in the sense of the cited cases, can hardly be deduced from the Act itself which places the collection of assessments primarily with the self-regulatory organizations whose office locations and collection procedures are clearly a matter of proof. The cause of action asserted by the Receiver obviously did not arise from the collection of assessments, nor did the Courts below so hold. Therefore jurisdiction could only be supported by proof of activity by SIPC in Tennessee, directly or through agents, which was so substantial as to establish a presence sufficient to render it generally amenable to sit in Tennessee.

The "relationship" to which the District Court referred, adopted by the Court of Appeals, can only be characterized as amorphous and inchoate. If such theories can be used to sustain *in personam* jurisdiction, then even the admitted elasticity of due process has no meaningful bounds. This Court's cautions against excesses in *Hanson*

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[49] In this connection the court observed that jurisdiction is not acquired because the forum is ". . . the 'center of gravity' of the controversy or the most convenient location for litigation." (at 254).

v. *Denckla* have gone unheeded by the Courts below whose rationale portends serious consequences for SIPC. By operation of the Act assessments are received from Members throughout the Nation. If the views below should stand, they are sufficiently potent to expose SIPC to suit in most federal district courts. Moreover, the abandonment in this case of the requirement of "presence", "activity" or "contact" with the forum carries broad implications for litigants generally. The decision below conflicts with this Court's decisions and basic due process. Review by this court would appear most appropriate.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted to review the opinion and judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

[Court of Appeals Opinion]

No. 73-1451

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

◆

Securities and Exchange Commission,
Appellee,
vs.
Guaranty Bond and Securities Corp., et al.,
Defendants,
James C. Barbour, Receiver,
Appellant.

Appeal from the United States District Court for the Middle District of Tennessee, Nashville Division.

◆

Decided and Filed April 23, 1974.

Before: Phillips, Chief Judge Celebrezze and Miller, Circuit judges.

Miller, Circuit Judge. Guaranty Bond and Securities Corporation was registered with the S.E.C. as a broker and dealer in securities as required by Section 15(b) of the Securities Exchange Act of 1934. As part of its business, it promoted the sale of church bonds. On December 22, 1970, the S.E.C. filed in the court below a complaint against Guaranty alleging net capital violations contrary to the federal securities laws, including Section 15(c)(3) of the Securities Exchange Act, 15 U.S.C. 780(c)(3). Injunctive relief was sought against the alleged violations.

The district court, finding that Guaranty had violated the S.E.C.'s net capital rule and that such violation had existed for a substantial period of time prior to the filing of the complaint by the S.E.C., granted a preliminary injunction. The court further found that between the filing of the complaint on December 22, 1970 and the granting of the injunction on January 6, 1971, Guaranty had continued to engage in substantial business, handling 101 transactions after the effective date of the Act creating the Security Investor Protection Corporation. On application of S.E.C., a receiver was appointed for Guaranty to take charge of all of its assets subject to the further orders of the court.

On March 31, 1972, the receiver filed a petition for an order directed to the S.E.C. and the Security Investor Protection Corporation requiring each of them to show cause why S.I.P.C. should not be required to intervene in the action and afford to the customers of Guaranty the benefits of the Act. The show cause order was issued accordingly and both S.E.C. and S.I.P.C. responded. The court, without an evidentiary hearing, filed its memorandum opinion in which it found the Act (S.I.P.A.) was inapplicable to customers of Guaranty for the reason that Guaranty was insolvent and in financial difficulties before the effective date of S.I.P.A. To hold otherwise, it was said, would be to give the Act a forbidden retroactive effect. The court accordingly ordered that S.I.P.A. should be dismissed from the action. This order was certified as a final judgment for purposes of appeal.

The Security Investor Protection Act was enacted in response to the need to protect the customers of securities brokers and dealers which might fail, thereby jeopardizing the cash and securities that customers had left on deposit with the firm.[1] S.I.P.A. accordingly created the Security Investor Protection Corporation as a "non-profit corporation," not designed to "be an agency or establishment of the United States Government," but rather to be "a membership corporation,"[2] consistent with the self-regulatory nature of the securities industry. 15 U.S.C. 78 ccc (a). The S.I.P.C.'s role is primarily one of consultation and cooperation with the self-regulatory organizations which remain subject to the federal securities laws and the rules of the S.E.C. By mandating membership in the S.I.P.C. for certain members of the securities industry and by granting the S.I.P.C. general assessment authority over the members in order to establish an S.I.P.C. fund, Congress accomplished its intention that the cost of providing protection to cus-

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[1] The legislative history shows the purpose of the S.I.P.A.

> The serious and persistent financial problems besetting the securities industry in recent months have led to the voluntary liquidations, mergers, receiverships or, less frequently, bankruptcies of a substantial number of brokerage houses. Such failures may lead to loss of customers' funds and securities with an inevitable weakening of confidence in the U. S. securities markets. Such lessened confidence has an effect on the entire economy. Whatever other steps must be taken to improve these conditions, one objective of the bill, as reported, is to provide investors protection against losses caused by the insolvency of their broker-dealer. The need is similar, in many respects to that which prompted the establishment of the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation.

4 U. S. Code Congressional and Administrative News 5255 (1970).

[2] The members of S.I.P.C., as defined by 15 U.S.C. Sec. 78 ccc (a) (2), are:

> (A) all persons registered as brokers or dealers under section 78o(b) of this title, and
>
> (B) all persons who are members of a national securities exchange,

other than persons whose business as a broker or dealer consists exclusively of (i) the distribution of shares of registered open end investment companies or unit investment trusts, (ii) the sale of variable annuities, (iii) the business of insurance, or (iv) the business of rendering investment advisory services to one or more registered investment companies or insurance company separate accounts;

tomers under S.I.P.C. was to be borne by the securities industry itself.[3]

Under 15 U.S.C. Sec. 78 eee (a)(1), if the S.E.C. or any self-regulatory organization believes that a broker or dealer subject to its regulations in, or approaching, financial difficulty, it must notify immediately the S.I.P.C. If the S.I.P.C. determines that a member broker or dealer has failed or is in danger of failing to meet its obligations to customers, it is authorized to seek a decree in an appropriate court adjudicating that the customers of a member of S.I.P.C. are in need of the protection of the Act. 15 U.S.C. Sec. 78 eee (a)(2). Upon so finding, the district court shall grant the decree and appoint a trustee for the liquidation of the business and an attorney for the trustee. The objectives of the proceeding, in addition to operating the business for a limited purpose, completing the open contractual commitments of the dealer, enforcing rights of subrogation and liquidating the business of the dealer, are "as promptly as possible" (1) to return specifically identifiable property to the customers of a firm, (2) to distribute the "single and separate fund," and (3) to pay to customers monies advanced by S.I.P.C. 15 U.S.C. 78 fff(a). To provide for prompt satisfaction of the net equities of the dealer's customers, S.I.P.C. must advance to the trustee such monies as may be required to satisfy the full claims of each customer not to exceed $50,000. 15 U.S.C. 78 fff(f).

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[3] S.I.P.C.'s first responsibility under the Act was to establish a fund which would consist of all amounts received by S.I.P.C. and from which all expenditures would be paid. 15 U.S.C. Sec. 78 ddd(c). If the fund should become insufficient for the purposes of the Act, the S.E.C. is authorized, if necessary for the protection of the customers of brokers and dealers and for the maintenance of confidence in the United States securities markets, to issue notes under certain conditions to the Secretary of the Treasury in an amount up to one billion dollars, which then may be lent to S.I.P.C. 15 U.S.C. 78 ddd (g).

If S.I.P.C. refuses to act, the S.E.C. is authorized by 15 U.S.C. 78 ggg(b),[4] to apply to the court for an order requiring the S.I.P.C. to discharge its obligations under the Act.

The present appeal involves a unique situation. The appellant, as mentioned earlier, urges, contrary to the district court's decision, that the Act is applicable to Guaranty Bond. The S.E.C. agrees with the appellant's contention that the Act is applicable, but challenges the court's decision that the receiver has standing to petition the court to apply the Act. The S.I.P.C. agrees with the district court as to the inapplicability of the Act but challenges, along with the S.E.C., the receiver-appellant's standing to obtain compliance with the Act.

The S.I.P.A. was effective on December 30, 1970. In two cases, *Lohf* v. *Casey,* 330 F.Supp. 356 (D. Colo. 1971), aff'd. 466 F.2d 618 (10th Cir. 1972) and *Bohart-McCaslin Ventures, Inc.* v. *Midwestern Securities Corp.,* 352 F.Supp. 937 (N.D. Texas 1973), courts have held that S.I.P.A. was not intended to apply to a broker-dealer who had failed prior to that date. The district court in *Lohf, supra* at 358 stated:

> ". . . it is equally clear that Congress expressed an intention of refusing to make the Act retroactive. The record is replete with comments to that effect, the most cogent example being the report of the Committee on Interstate and Foreign Commerce:

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[4] 15 U.S.C. 78 ggg (b) provides that:

> In the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member of SIPC, the Commission may apply to the district court of the United States in which the principal office of SIPC is located for an order requiring SIPC to discharge its obligations under this chapter and for such other relief as the court may deem appropriate to carry out the purposes of this chapter.

As mentioned above, this section is hardly couched in terms of exclusivity—a feat easily accomplished had it been the intent of Congress.

> 'It is the clear intention of your committee that SIPC assume no liability for firms either in net capital violation, in liquidation, or in bankruptcy at the time of creation of SIPC. H.R. Rep. No. 1613, 91st Cong., 2nd Sess. 14 (Oct. 21, 1970), reprinted in 3 U.S. Code Cong. & Admin. News '70 at 5268.'
>
> This language is frequently echoed in the debates on this bill, and it seems clear that Congress did not intend the bill to operate retroactively."

Congress seemed to be concerned that S.I.P.C. not be used to compensate customers of members firms of the New York Stock Exchange which "have closed their doors and begun liquidation," when the Exchange had not advanced money from its existing trust fund to protect the customers of those firms. As mentioned earlier in the *Lohf* quote, the Committee Report did use very broad language when it stated that coverage be withheld from firms "either in net capital violation, in liquidation, or in bankruptcy at the time of the creation of S.I.P.C." H.R. Rep. No. 91-1613, 91st Cong., 2d Sess. p. 14 (1970). The meaning of this broad language was subsequently clarified by Representative Moss, sponsor of the Bill, on the floor of the House, when he stated:

> "Finally, we have been concerned all along with the problem of providing protection to the customers of *firms that might fail before enactment of the bill into law.* We early anticipated this possibility but we have specifically declined to make the bill retroactive in its application. The bill is prospective from the date of its enactment." [emphasis supplied] 116 Cong. Rec. 39350-39351, 12-1-70).

Congress, lacking precise information on the condition of the industry, was concerned with the impact that S.I.P.C. coverage might have on the Treasury. The losses that had already been experienced by the industry were regarded by Congress as the industry's responsibility. S. Rep. No. 1218, 91st Cong. 2d Sess. 6 (1970); H.R. Rep. No. 91-1613, 91st Cong., 2d Sess. 14 (1970).

Clearly to apply S.I.P.C. to a firm that was bankrupt prior to the Act would be to give the Act a retroactive application that runs counter to the Act's clear purpose as reflected by its legislative history. However, application of the Act to Guaranty would not be in our view a retroactive application. "A statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends are drawn from a time antecedent to its enactment." *Cox* v. *Hart,* 260 U.S. 427 (1922). The time period of the financial difficulties of the broker-dealer bears more on the status of the broker within the meaning of the Act than upon the issue of retroactivity.

The court in *Lohf* found the absence of business activity subsequent to the effective date of the Act as determinative of the non-coverage issue when it stated:

> However, it is apparent that plaintiff was not conducting its business as a broker or dealer at the effective date of the Act. The business was in the jurisdiction of the bankruptcy court, and the day to day decisions were being made by the trustee. We cannot consider plaintiff then to be a "broker or dealer," whether registered or not, as contemplated by the Act. It makes no difference for these purposes that plaintiff's registration had not been offically terminated, and thus the automatic membership in the Securities Investor Protection Corporation may have continued in form. It could not be expected that the Act could be applied to firms which had already gone out of business. Plaintiff thus did not have the status of a broker or dealer for the purposes of the Act. 466 F.2d at 620.

The district court in *Behart-McCaslin Ventures, Inc., supra* at 940 made a similar determination when it stated:

> For purposes of determining coverage under the Act, this Court discerns no legal difference between a firm in bankruptcy and a firm in the financial and

> legal condition which Midwestern suffered prior to the effective date of the Act. Midwestern, prior to the effective date of the Act, had ceased to be a broker-dealer in any real sense of that terms and has not resumed the normal activities of a broker-dealer even at the present time.

These determinations are not applicable to Guaranty since it actually conducted a substantial business after the effective date of the Act. In light of the purposes of the Act, the 101 transactions conducted by Guaranty after the effective date are sufficient, we believe, to qualify Guaranty's customers for the protection provided by the Act. As the Tenth Circuit stated in *Lohf* concerning the coverage of the Act:

> We must take this to mean firms or persons which were actually in business in the usual sense at the critical date were the "brokers or dealers" referred to. Congress was willing to extend coverage to then financially weak institutions and those of unknown strength, but the line was drawn to exclude those which had failed and were thus in fact not brokers or dealers. Supra at 621.

We hold that Guaranty, though financially weak, was, in fact, a broker or dealer at the effective date of the Act.

The court below focused on the filing date of the action against Guaranty by the S.E.C. which was prior to the effective date of the Act. However, the S.E.C. did not seek to force Guaranty into receivership until after the effective date Therefore, the filing of the original S.E.C. action did not prevent Guaranty from conducting normal business after the effective date of the Act and thus qualifying as a broker-dealer.

The S.I.P.C. and the S.E.C. challenge the receiver's standing to bring an action to compel either of them to act under the S.I.P.A. The court below held that the provisions of the Act "do not limit this court's power to adjudicate an enforcement action brought by a receiver of an insolvent member of S.I.P.C." We agree. The appellees point to an absence of express language providing for an enforcement action by the customers of a securities company or their representatives as prohibiting such an action. We are persuaded, however, that the lack of express language of exclusivity in providing for an enforcement action by the S.E.C., coupled with a general provision allowing for suits against the S.I.P.C.,[5] evidences an intent by Congress that the statute should not be as narrowly construed as the appellees urge.

The customers of Guaranty have a definite interest in the application of the S.I.P.A. to the present litigation. The receiver, the representative of the customers of Guaranty, seeks to have the S.I.P.C. meet its obligations to the customers under the broad purposes of the S.I.P.A. Apparently, the S.I.P.C. has not attempted to obtain an adjudication of the necessity for providing the protections of the S.I.P.A. to the customers of Guaranty. Nor has the S.E.C. moved to compel the S.I.P.C. to meet its obligations. We do not believe that Congress intended under such circumstances to leave the customers of securities firms without remedy under the S.I.P.A. Furthermore, despite the appellees urgings, we find no constitutional[6] or statutory prohibition[7] to the maintenance of an enforcement action by the receiver in this case.[8]

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[5] 15 U.S.C. 78 ccc (b) (1) provides that the S.I.P.C. has the power "to sue and be sued, complain and defend, in its corporate name, through its own counsel, in any court, State or Federal."

[6] To meet the "case or controversy" requirement of the Constitution, the Supreme Court has formulated a standard for ascertaining those persons with "standing" for maintaining an action in a federal court. The standard as defined by the Supreme Court in *Sierra Club* v. *Morton*, 405 U.S. 727 (1971), is that one must have suffered "injury in fact" and the injury must be an "interest arguably within the zone of interests to be protected." The customers of Guaranty and their representative clearly meet this broad standard. *See also Data Processing Service* v. *Camp*, 397 U.S. 150.

The judgment of the district court holding the S.I.P.A. inapplicable and dismissing the action as to S.I.P.C. must therefore be reversed for the reasons stated herein. Since we reject the premise on which the S.I.P.C. was dismissed as a party to the action—inapplicability of the S.I.P.A. to a company of Guaranty's status—the action is remanded to the district court for processing consistent with this opinion and specifically to determine and enforce any rights of Guaranty's customers under the S.I.P.A.

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[7] As mentioned earlier, there are no terms of exclusivity of enforcement in the statute.

[8] The S.I.P.C. also attacks the jurisdiction—both subject matter and in personam—of the district court to entertain this action. We find that the district court sufficiently disposed of these contentions in its memorandum opinion.

FILED
APRIL 23, 1974
JAMES A. HIGGENS, *Clerk*

APPENDIX B

[Court of Appeals Judgment]

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 73-1451

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
vs.
GUARANTY BOND AND SECURITIES CORPORATION, ET. AL.,
Defendants,
JAMES C. BARBOUR, RECEIVER,
Appellant.

Before: PHILLIPS, Chief Judge, CELEBREZZE and MILLER, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Middle District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case is remanded for further proceedings.

It is further ordered that Appellant recover from Appellee, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN
Clerk

A True Copy.

Attest:
John P. Hehman, Clerk

Issued as Mandate:

Costs To be recovered by Appellant	
Filing fee	$25.00
Printing	$ —
Total	$25.00

APPENDIX C

[District Court Opinion]

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 5989

SECURITIES AND EXCHANGE COMMISSION
vs.
GUARANTY BOND AND SECURITIES CORPORATION, et al.

MEMORANDUM—No. 54

On December 22, 1970, the Securities and Exchange Commission (hereinafter the "Commission") filed a complaint and moved for a preliminary injunction against Guaranty Bond and Securities Corporation (hereinafter "Guaranty") on the basis of alleged violations of the Securities Exchange Act of 1934 and of the Securities Exchange Act of 1933. On January 6, 1971, the injunction was granted, and this court found, among other things, that Guaranty had violated the Commission's net capital rule by doing business (1) while its net capital was less than $5,000, and (2) while its aggregate indebtedness exceeded 2,000 per centum of it net capital, see § 15(c)(3) of the Exchange Act, 15 U.S.C. § 78o(c)(3) and Rule 15c3-1, 17 C.F.R. 240.15c3-1, and that the net capital violation had existed for a substantial period of time prior to the filing of the complaint by the Commission. In the period from December 22, 1970, to January 6, 1971, Guaranty continued to do business, and prior to January 6, handled 101 transactions during 1971. Then, pursuant to the Commission's motion, a receiver was appointed by agreed order entered on January 29, 1971.

On May 27, 1971, the receiver made demand upon the Securities Investor Protection Corporation (hereinafter "SIPC") for protection of Guaranty's customers under the Securities Investor Protection Act of 1970, 15 U.S.C. § 78aaa, *et seq.* (hereinafter the "Act"), but SIPC refused. The Commission had not given SIPC a formal notice as provided by § 5(a)(1) of the Act that Guaranty was approaching financial difficulty, and had taken no other action to see that SIPC intervened. On April 6, 1972, pursuant to the receiver's petition, an order was entered requiring the Commission and SIPC to show cause why the remedies afforded by the Act should not be made available in this situation. Guaranty has been registered with the Commission as a broker-dealer under § 15 of the Securities Exchange Act, 15 U.S.C. § 78o, since June 20, 1962, and was therefore a member of SIPC on December 30, 1970, the date the Act became effective. See § 3(a) of the Act, 15 U.S.C. § 78ccc(a). The case is now before the court upon SIPC's response, which asserts three principal reasons why the relief requested should be denied: (1) lack of personal jurisdiction over SIPC; (2) lack of subject matter jurisdiction; and (3) exclusion of Guaranty by the terms of the Act.

PERSONAL JURISDICTION

SIPC alleges that it is a non-resident foreign corporation created by Congress and that effective service of process can only be achieved in accordance with Rule 4(d)(7), 4(e) and 4(f) of the Federal Rules of Civil Procedure, which in turn would require application of Tennessee law governing service of process on foreign corporations. SIPC asserts that since it is not doing business in Tennessee, it is not subject to service of process issued in Tennessee.

This contention must be rejected. The Act plainly provides that SIPC will impose assessments on its members, collect these assessments through its collection agent, and extend protection to customers of its members. Since many members of SIPC are located within the state of Tennessee, it necessarily follows that the execution of these statutory activities anticipates a continuing relationship between SIPC and its members and customers, and the doing of these acts within the state of Tennessee necessary to achieve the purposes for which the Act was conceived. The nature of this relationship and the protection which SIPC affords Tennessee investors is sufficient in this court's opinion to warrant the exercise of in personam jurisdiction consistent with due process, and to be " . . . such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe* v. *State of Washington*, 326 U.S. 310, 316 (1945). *See also, McGhee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957).

The court finds this holding to be consistent with the Tennessee long-arm statute, T.C.A. § 20-235, *et seq.*, which has been construed by the Tennessee courts as conferring " . . . jurisdiction over non-resident defendants to the extent permitted by the due process clause," *Darby* v. *Superior Supply Co.*, 224 Tenn. 540, 458 S.W.2d 423, 426 (1970), and in accord with this circuit's interpretation of that statute's permissible breadth under the due process clause of the Fourteenth Amendment. *See King* v. *Hailey Chevrolet*, 462 F.2d 63 (6th Cir. 1972); *Southern Machine Company* v. *Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968). Certainly it can be said that ". . . Tennessee has an interest in resolving the conflict at issue. . . ." *Southern Machine Company* v. *Mohasco Industries, Inc.*, *supra*, at 384.

SUBJECT MATTER JURISDICTION

SIPC asserts that although by § 3 of the Act it is made subject to and granted all the powers conferred upon a non-public corporation by the District of Columbia Non-Profit Corporation Act, and is granted additional powers under subsection (b) to sue and be sued in any court, state or federal, there is a clear congressional mandate that enforcement actions against SIPC must be brought where its principal office is located. This assertion is based upon the fact that § 7(b) provides that in the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member, the Commission may apply to the district court of the United States in which the principal office of SIPC is located for an order requiring SIPC to discharge its obligation under the Act, and that had the Commission elected to seek enforcement in this case, the action would have to have been brought in Washington, D. C., the location of the principal and only office of SIPC.

For this reason, SIPC asserts that the court lacks subject matter jurisdiction to adjudicate the relief sought. The court finds this contention without merit, for the effect of such a proposition would not only be to substantially frustrate a principal goal of the Act—protection of public investors, but would also render meaningless the language of § 3(b)(1) which confers upon SIPC the right to sue and be sued in any court, state or federal. Had the instant proceeding been instituted in this court by the Commission rather than the receiver, then under § 7(b) of the Act dismissal of the action for improper venue if not lack of subject matter jurisdiction might logically be required. However, the fact that the receiver's enforcement action here is of the same type which, under § 7(b), the Commission may institute in the district court coterminous with the locale of SIPC's principal office does not compel the conclusion that the receiver must do likewise, nor that district courts other than those of the District of Columbia lack subject matter jurisdiction over claims arising under the Act. If substance and meaning are to be given to the Act and to the legislative goal of investor protection, then the default or neglect of the Commission to institute enforcement proceedings under § 7(b) should give rise to a similar cause of action by a receiver in behalf of a member's customers. When such an occasion arises, § 7(b) must be read in *pari materia* with § 3(b)(1) so as to provide a forum of practical utility to the parties involved and which can give meaningful effect to the Act as a whole in the protection of SIPC's members and their customers located throughout the country.

Since the jurisdictional interpretation sought by SIPC would, in severely limiting access to the courts, run counter to these considerations, the court finds that the provisions of § 7(b) do not limit this court's power to adjudicate an enforcement action brought by a receiver of an insolvent member of SIPC.

EXCLUSION OF GUARANTY UNDER THE ACT

SIPC contends that the application of the Act to this case would be to give it an unlawful retroactive effect. There is no dispute that the Act was intended to operate prospectively only. As stated by the court in *Lohf* v. *Casey*, 330 F. Supp. 356, 358 (D. Colo. 1971), *aff'd.* 446 F.2d 618 (10th Cir. 1972):

> ". . . it is equally clear that Congress expressed an intention of refusing to make the Act retroactive. The record is replete with comments to that effect, the most cogent example being the report of the Committee on Interstate and Foreign Commerce:
>
> " 'It is the clear intention of your committee that SIPC assume no liability for firms either in net capital violation, in liquidation, or in bankruptcy at the time of creation of SIPC. H. R. Rep. No. 1613, 91st Cong., 2nd Sess. 4 (Oct. 21, 1970), reprinted in 3 U.S. Code Cong. & Admin. News '70 at 5268.'

> "This language is frequently echoed in the debates on this bill, and it seems clear that Congress did not intend the bill to operate retroactively."

As further evidence of the scope of coverage envisioned by Congress, Representative Moss, one of the proponents of the Act and a member of the Conference Committee stated:

> "This is not anticipated as bailing out those firms or their customers. This would be outside the scope of this bill. This bill does not cover retroactively." 116 Cong. Rec. 39,362 (1970).

Notwithstanding the prospective provisions of the Act, there remains the problem of whether the relief sought here would constitute a retroactive application. The Act provides that the rights of claimants are fixed as of the "filing date". In explanation of this term, § 5(b)(4)(B) provides:

> "(B) *Filing date.*—The term 'filing date' means the date on which an application with respect to any debtor is filed under subsection (a)(2); except that if—
>
> (i) a petition was filed before such date by or against the debtor under the Bankruptcy Act, or
>
> (ii) the debtor is the subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such debtor was appointed which proceeding was commenced before the date on which such application was filed,
>
> then the term 'filing date' means the date on which such petition was filed or such proceeding commenced."

In terms of the instant proceeding, a receiver was not appointed until January 29, 1971. SIPC contends, however, that this receivership was merely an ancillary action taken pursuant to the injunction proceeding which was commenced on December 22, 1970, eight days prior to the Act's effective date. Although § 5(b)(4)(B)(ii) is rather equivocal, the court is inclined to agree with SIPC that the injunction proceeding commenced on December 22, 1970, determined the filing date by reason of the receiver subsequently appointed. Furthermore, there is another persuasive factor present which compels the same conclusion. The injunction sought by the Commission was based in part upon the failure of Guaranty to meet the net capital requirements of Rule 15c3-1, 17 C.F.R. 240.15c3-1. As previously reflected by the legislative history, the Act was not intended to cover firms in such violation prior to December 30, 1970. This fact, coupled with the inescapable conclusion, drawn from evidence precipitated by the injunction proceeding, that Guaranty was hopelessly insolvent prior to December 30, 1970, persuades the court that to grant the requested relief would be a retroactive application of the Act and a clear frustration of legislative intent. Therefore, the court holds that customers of Guaranty are not entitled to protection under the Act, and it is hereby ORDERED that SIPC be dismissed as a party to this cause.

L. Clure Morton
L. Clure Morton
United States District Judge

APPENDIX D

[Relevant Sections of the Securities Investor Protection Act of 1970]

Section 3 §78ccc. Securities Investor Protection Corporation

(a) *Creation.*—There is hereby established a body corporate to be known as "Securities Investor Protection Corporation" (hereafter in this chapter referred to as "SIPC"). SIPC shall be a nonprofit corporation and shall have succession until dissolved by act of the Congress SIPC shall—

(1) not be an agency or establishment of the United States Government;

(2) be a membership corporation the members of which shall be—

(A) all persons registered as brokers or dealers under section 78*o*(b) of this title, and

(B) all persons who are members of a national securities exchange,

other than persons whose business as a broker or dealer consists exclusively of (i) the distribution of shares of registered open end investment companies or unit investment trusts, (ii) the sale of variable annuities, (iii) the business of insurance, or (iv) the business of rendering investment advisory services to one or more registered investment companies or insurance company separate accounts; and

(3) except as otherwise provided in this chapter, be subject to, and have all the powers conferred upon a nonprofit corporation by, the District of Columbia Nonprofit Corporation Act (D.C. Code, sec. 29-1001 and fol.).

(b) *Powers.*—In addition to the powers granted to SIPC elsewhere in this chapter, SIPC shall have the power—

(1) to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State, or Federal;

* * * *

ection 4 §78ddd. SIPC Fund

(a) *In general.*—

(1) *Establishment of fund.*—SIPC shall establish a "SIPC Fund" (hereinafter in this chapter referred to as the "fund"). All amounts received by SIPC (other than amounts paid directly to any lender pursuant to any pledge securing a borrowing by SIPC) shall be deposited in the fund, and all expenditures the beneficial owner of 5 per centum or more of

(2) *Balance of the fund.*—The balance of the fund at any time shall consist of the aggregate at such time of the following items:

(A) Cash on hand or on deposit.

(B) Amounts invested in United States Government or agency securities.

(C) Confirmed lines of credit.

(3) *Confirmed lines of credit.*—For purposes of this section, the amount of confirmed lines of credit as of any time is the aggregate amount which SIPC at such time has the right to borrow from banks and other financial institutions under confirmed lines of credit or other written agreements which provide that moneys so borrowed are to be repayable by SIPC not less than one year from the time of such borrowings (including, for purposes of determining when such moneys are repayable, all rights of extension, refunding, or renewal at the election of SIPC).

(b) *Initial required balance for fund.*—Within one hundred and twenty days from December 30, 1970, the balance of the fund shall aggregate not less than $75,000,000, less any amounts expended from the fund within that period.

(c) *Assessments.*—

(1) *Initial assessments.*—Each member of SIPC shall pay to SIPC, or the collection agent for SIPC specified in section 78iii (a) of this title, on or before the one hundred and twentieth day following December 30, 1970, an assessment equal to one-eighth of 1 per centum of the gross revenues from the securities business of such member during the calendar year 1969, or if the Commission shall determine that, for purposes of assessment pursuant to this paragraph, a lesser percentage of gross revenues from the securities business is appropriate for any class or classes of members (taking into account relevant factors, including but not limited to types of business done and nature of securities sold), such lesser percentages as the Commission, by rule or regulation, shall establish for such class or classes, but in no event less than one-sixteenth of 1 per centum for any such class. In no event shall any assessment upon a member pursuant to this paragraph be less than $150.

(2) *General assessment authority.*—SIPC shall, by bylaw or rule, impose upon its members such assessments as, after consultation with self-regulatory organizations, SIPC may deem necessary and appropriate to establish and maintain the fund and to repay any borrowings by SIPC. Any assessments so made shall be in conformity with contractual obligations made by SIPC in connection with any borrowing incurred by SIPC. Subject to paragraph (3) and subsection (d) (1) (A) of this section, any such assessment upon the members, or any one or more classes thereof, may, in whole or in part, be based upon or measured by (A) the amount of their gross revenues from the securities business, or (B) all or any of the following factors: the amount or composition of their gross revenues from the securities business, the number or dollar volume of transactions effected by them, the number of customer accounts maintained by them or the amounts of cash and

securities in such accounts, their net capital, the nature of their activities (whether in the securities business or otherwise) and the consequent risks, or other relevant factors.

(3) *Limitations.*—Notwithstanding any other provision of this chapter (other than section 78ccc(f) of this title)—

(A) no assessment shall be made upon a member otherwise than pursuant to paragraph (1) or (2) of this subsection,

(B) an assessment may be made under paragraph (2) of this subsection at a rate in excess of one-half of one per centum during any twelve-month period if SIPC determines, in accordance with a bylaw or rule, that such rate of assessment during such period will not have a material adverse effect on the financial condition of its members or their customers, except that no assessments shall be made pursuant to such paragraph upon a member which require payments during any such period which exceed in the aggregate one per centum of such member's gross revenues from the securities business for such period, and

(C) no assessment shall include any charge based upon the member's activities (i) in the distribution of shares of registered open end investment companies or unit investment trusts, (ii) in the sale of variable annuities, (iii) in the business of insurance, or (iv) in the business of rendering investment advisory services to one or more registered investment companies or insurance company separate accounts.

(d) *Requirements respecting assessments and lines of credit.*—

(1) *Assessments.*—

(A) *½ of 1 percent assessment.*—Subject to subsection (c) (3) of this section, SIPC shall impose upon each of its members an assessment at a rate

of not less than one-half of 1 per centum per annum of the gross revenues from the securities business of such member—

(i) until the balance of the fund aggregates not less than $150,000,000 (or such other amount as the Commission may determine in the public interest),

(ii) during any period when there is outstanding borrowing by SIPC pursuant to subsection (f) or subsection (g) of this section, and

(iii) whenever the balance of the fund (exclusive of confirmed lines of credit) is below $100,000,000 (or such other amount as the Commission may determine in the public interest).

(B) *¼ of 1 percent assessment.*—During any period during which—

(i) the balance of the fund (exclusive of confirmed lines of credit) aggregates less than $150,000,000 (or such other amount as the Commission has determined under paragraph (2) (B)), or

(ii) SIPC is required under paragraph (2) (B) to phase out of the fund all confirmed lines of credit,

SIPC shall endeavor to make assessments in such a manner that the aggregate assessments payable by its members during such period shall not be less than one-fourth of 1 per centum per annum of the aggregate gross revenues from the securities business for such members during such period.

(2) *Lines of credit.*—

(A) *$50,000,000 limit after 1973. — After* December 31, 1973, confirmed lines of credit shall not constitute more than $50,000,000 of the balance of the fund.

(B) *Phaseout requirement.*—When the balance of the fund aggregates $150,000,000 (or such other amount as the Commission may determine in the public interest) SIPC shall phase out of the fund all confirmed lines of credit.

* * * * *

Section 5

§78eee. Protection of customers

(a) *Determination of need of protection.—*

(1) *Notice to SIPC.*—If the Commission or any self-regulatory organization is aware of facts which lead it to believe that any broker or dealer subject to its regulation is in or is approaching financial difficulty, it shall immediately notify SIPC, and, if such notification is by a self-regulatory organization, the Commission.

(2) *Action by SIPC.*—If SIPC determines that any member has failed or is in danger of failing to meet its obligations to customers and that there exists one or more of the conditions specified in subsection (b) (1) (A) of this section, SIPC, upon notice to such member, may apply to any court of competent jurisdiction specified in section 78aa or 78u(e) of this title for a decree adjudicating that customers of such member are in need of the protection provided by this chapter.

(3) *Effect of other pending actions.*—An application under paragraph (2)—

(A) with the consent of the Commission, may be combined with any action brought by the Commission including an action by it for a temporary receiver pending an appointment of a trustee under subsection (b) (3) of this section, and

(B) may be filed notwithstanding the pendency in the same or any other court of any bankruptcy, mortgage foreclosure, or equity receivership proceeding or any proceeding to reorganize, conserve, or liquidate such member or its property, or any proceeding to enforce a lien against property of such member.

(b) *Court action.—*

(1) *Issuance of decree.—*

(A) *Findings by court.*—A court to which application is made pursuant to subsection (a) (2) of this section shall grant the application and issue a decree adjudicating that customers of the member named in the application are in need of protection under this chapter if it finds that such member—

(i) is insolvent within the meaning of section 1(19) of Title 11, or is unable to meet its obligations as they mature, or

(ii) has committed an act of bankruptcy within the meaning of section 21 of Title 11, or

(iii) is the subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such member has been appointed, or

(iv) is not in compliance with applicable requirements under the 1934 Act or rules or regulations of the Commission or any self-regulatory organization with respect to financial responsibility or hypothecation of customers' securities, or

(v) is unable to make such computations as may be necessary to establish compliance with such financial responsibility or hypothecation rules or regulations.

(B) *Uncontested, etc., applications.*—If within three business days after the filing of an application pursuant to subsection (a) (2) of this section, or such other period as the court may order, the debtor shall consent to or fail to contest such application or shall fail to show facts sufficient to contorvert (sic) any material allegation of such application, the court shall forthwith grant the application and issue a decree adjudicating that customers of the member named in the application are in need of protection under this chapter.

(2) *Exclusive jurisdiction over debtor.*—Upon the filing of an application pursuant to subsection (a) (2) of this section, the court to which application is made shall have exclusive jurisdiction of the debtor involved and its property wherever located with the powers, to the extent consistent with the purposes of this chapter, of a court of bankruptcy and of a court in a proceeding under chapter X of the Bankruptcy Act. Pending an adjudication under paragraph (1) such court shall stay, and upon appointment by it of a trustee as provided in paragraph (3) such court shall continue the stay of, any pending bankruptcy, mortgage foreclosure, equity receivership, or other proceeding to reorganize, conserve, or liquidate the debtor or its property and any other suit against any receiver, conservator, or trustee of the debtor or its property. Pending such adjudication and upon the appointment by it of such trustee, the court may stay any proceeding to enforce a lien against property of the debtor or any other suit against the debtor. Pending such adjudication, such court may appoint a temporary receiver.

(3) *Appointment of trustee.*—If the court grants an application and makes an adjudication under paragraph (1), the court shall forthwith appoint as trustee for the liquidation of the business of the debtor in accordance with section 6, and as attorney for such trustee, such persons as SIPC shall specify. No person shall be appointed as such trustee or attorney if such person is not "disinterested" within the meaning of section 558 of Title 11.

(4) *Debtor and filing date defined.*—For purposes of this chapter—

(A) *Debtor.*—The term "debtor" means a member of SIPC in respect of whom an application has been filed pursuant to subsection (a) (2) of this section.

(B) *Filing date.*—The term "filing date" means the date on which an application with respect to any debtor is filed under subsection (a) (2) of this section; except that if—

(i) a petition was filed before such date by or against the debtor under the Bankruptcy Act, or

(ii) the debtor is the subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such debtor was appointed which proceeding was commenced before the date on which such application was filed,

then the term "filing date" means the date on which such petition was filed or such proceeding commenced.

(c) *SEC participation in proceedings.*—The Commission may, on its own motion, file notice of its appearance in any proceeding under this chapter and may thereafter participate as a party.

Section 6

§78fff. Liquidation proceedings

(a) *General purposes of liquidating proceeding.*—The purposes of any proceeding in which a trustee has been appointed under section 78eee(b) (3) of this title (hereafter in this section referred to as a "liquidation proceeding") shall be:

(1) as promptly as possible after such appointment and in accordance with the provisions of this section—

(A) to return specifically identifiable property to the customers of the debtor entitled thereto;

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(B) to distribute the single and separate fund, and (in advance thereof or concurrently therewith) pay to customers moneys advanced by SIPC, as provided in subsection (f) of this section;

(2) to operate the business of the debtor in order to complete open contractual commitments of the debtor pursuant to subsection (d) of this section;

(3) to enforce rights of subrogation as provided in this chapter; and

(4) to liquidate the business of the debtor.

(b) *Powers and Duties of Trustee.*—

(1) *Trustee powers.*—A trustee appointed under section 78eee(b) (3) of this title (hereinafter referred to as "trustee") shall be vested with the same powers and title with respect to the debtor and the property of the debtor, and the same rights to avoid preferences, as a trustee in bankruptcy and a trustee under chapter X of the Bankruptcy Act have with respect to a bankrupt and a chapter X debtor. In addition, a trustee shall have the right—

(A) with the approval of SIPC, to hire and fix the compensation of all personnel (including officers and employees of the debtor and of its examining authority) and other persons (including but not limited to accountants) that are deemed by such trustee necessary for all or any purposes of the liquidation proceeding, and

(B) to operate the business of the debtor in order to complete open contractual commitments pursuant to subsection (d) of this section,

and no approval of the court shall be required therefor.

(2) *Trustee duties.*—Except as inconsistent with the provisions of this chapter or otherwise ordered by the court, a trustee shall be subject to the same duties as a trustee appointed under section 72 of

Title 11, except that a trustee may, but shall have no duty to, reduce to money any securities in the single and separate fund (provided under subsection (c) (2) (B) of this section) or in the general estate of the debtor.

(c) *Application of Bankruptcy Act.*—

(1) *General provisions applicable.*—Except as inconsistent with the provisions of this chapter and except that in no event shall a plan of reorganization be formulated, a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under, the provisions of chapter X and such of the provisions (other than section 96(e) of Title 11) of chapters I to VII, inclusive, of the Bankruptcy Act as section 502 of Title 11 would make applicable if an order of the court had been entered directing that bankruptcy be proceeded with pursuant to the provisions of such chapters I to VII, inclusive; except that the court may, for such period as may be appropriate, stay enforcement of, but shall not abrogate, the rights provided in section 108 of Title 11 and the right to enforce a valid, nonpreferential lien or pledge against the property of the debtor. For purposes of applying the Bankruptcy Act in carrying out this section, any reference in the Bankrupty Act to the date of commencement of proceedings under the Bankruptcy Act shall be deemed to be a reference to the filing date (as defined in section 78eee(b) (4) (B) of this title).

(2) *Special provisions.*—The following subparagraphs of this paragraph shall apply to a liquidation proceeding in lieu of section 96(e) of Title 11:

(A) *Definitions.*—Except as otherwise expressly provided in this section, for purposes of this section and the application of the Bankruptcy Act to a liquidation proceeding—

(i) "property" includes cash and securities, whether or not negotiable and all property of a similar character;

(ii) "customers" of a debtor means persons (including persons with whom the debtor deals as principal or agent) who have claims on account of securities received, acquired, or held by the debtor from or for the account of such persons (I) for safekeeping, or (II) with a view to sale, or (III) to cover consummated sales, or (IV) pursuant to purchases, or (V) as collateral security, or (VI) by way of loans of securities by such persons to the debtor, and shall include persons who have claims against the debtor arising out of sales or conversions of such securities, and shall include any person who has deposited cash with the debtor for the purpose of purchasing securities, but shall not include any person to the extent that such person has a claim for property which by contract, agreement, or understanding, or by operation of law, is part of the capital of the debtor or is subordinated to the claims of creditors of the debtor;

(iii) "cash customer" means, with respect to any securities or cash, customers entitled to immediate possession of such securities or cash without the payment of any sum to the debtor, and for purposes of this clause, the same person may be a cash customer with reference to certain securities or cash and not a cash customer with reference to other securities or cash;

(iv) "net equity" of a customer's account or accounts means the dollar amount thereof determined by giving effect to open contractual commitments completed as provided in subsection (d) of this section, by excluding any specifically identifiable property reclaimable by the customer, and by subtracting the indebtedness, if any, of the customer to the debtor from the sum which would have been owing by the debtor to the customer had the debtor liquidated, by sale or purchase on the filing date, all other securities and contractual commitments of the customer, and for purposes of this definition, accounts held by a customer in separate capacities shall be deemed to be accounts of separate customers; and

(v) "securities" has the same meaning as such term has under section 96(e) of Title 11.

(B) *Single and separate fund.*—All property at any time received, acquired, or held by or for the account of a debtor from or for the account of customers except cash customers who are able to identify specifically their property in the manner prescribed in subparagraph (C), and the proceeds of all customers' property transferred by the debtor, including property unlawfully converted, shall constitute a single and separate fund; and all customers except such cash customers shall constitute a single and separate class of creditors, entitled to share ratably in such fund on the basis of their respective net equities as of the filing date and in priority to all other payments, except that (i) there shall be repaid to SIPC, in priority to all other claims payable from such single and separate fund, the amount of all advances made by SIPC to the trustee to permit the completion of open contractual commitments pursuant to subsection (d) of this section, and (ii) to the extent that any other assets of the debtor may be available therefor as otherwise ordered by the court, all costs and expenses specified in clauses (1) and (2) of section 104(a) of Title 11 shall be paid from such single and separate fund in priority to the claims of such single and separate class of creditors, and any moneys advanced by SIPC for such costs and expenses shall be recouped as such. If such single and separate fund shall not be sufficient to pay in full the claims of such single and separate class of creditors, the creditors of such class shall be entitled, to the extent only of their respective unpaid balances, to share in the general estate with general creditors. In, or for the purpose of, distributing such fund, all property other than cash shall be valued as of the close of business on the filing date. To the greatest extent considered practicable by the trustee, the trustee shall deliver in payment of claims of customers for their net equities based upon securities held on the filing date in their accounts (after giving effect to open contractual commitments completed as hereinafter provided), securities of the same class and series of an issuer ratably up to the respective amounts which were so held in such accounts. Any property remaining after the liquidation of a lien or pledge made by a debtor shall be apportioned between his general estate and the single and separate fund in the proportion in which the general property of the debtor and the property of his customers contributed to such lien or pledge.

(C) *Specifically identifiable property.* — The trustee shall return specifically identifiable property to the customers of the debtor, entitled thereto. No cash or securities at any time received, acquired, or held by or for the account of a debtor from or for the accounts of customers shall for the purposes of this paragraph be deemed to be specifically identified, unless such property remained in its identical form in the debtor's possession until the filing date, or unless such property was allocated to or physically set aside for such customers on the filing date. In determining whether property was allocated to or physically set aside for such customers, it shall be sufficient that on the filing date:

(i) securities are segregated individually, or in bulk for customers collectively;

(ii) in the case of securities held for the account of the debtor as part of any central certificate service of any clearing corporation or any similar depositary—

(I) the records of the debtor show or there is otherwise established to the satisfaction of the trustee that all or a specified part of the securities held by such clearing corporation or other similar depositary are held for specified customers, or for customers collectively, and

(II) such records of the debtor also show or there is otherwise established to the satisfaction of the trustee the identities of the particular customers entitled to receive specified numbers or units of such securities so held for customers collectively; or

(iii) such property is held for the account of customers of the debtor in such other manner as the Commission, for the protection of customers and other creditors on a fair and equitable basis, by rule or regulation shall have determined to be sufficiently identifiable as the property of such customers.

If there is any shortage in securities of the same class and series of an issuer so segregated in bulk or otherwise held for customers pursuant to this subparagraph, as compared to the aggregate rights of particular customers to receive securities of such class and series, the respective interests of such customers in such securities of such class and series shall be prorated, without prejudice, however, to the satisfaction of any claim for deficiencies as otherwise provided in this section.

(D) Where such single and separate fund is not sufficient to pay in full the claims of such single and separate class of creditors, a transfer by a debtor of any property which, except for such transfer, would have been a part of such fund may be recovered by the trustee for the benefit of such fund, if such transfer is voidable or void under the provisions of the Bankruptcy Act. For the purpose of such recovery, the property so transferred shall be deemed to have been the property of the debtor and, if such transfer was made to a customer or for his benefit, such customer shall be deemed to have been a creditor, the laws of any State to the contrary notwithstanding. Subject to the provisions of paragraph (D), if any securities received or acquired by a debtor from a cash customer are transferred by the debtor, such customer shall not have any specific interest in or specific right to any securities of like kind on hand on the filing date, but such securities of like kind or the proceeds thereof shall become part of such single and separate fund.

(d) *Completion of open contractural (sic) commitments.*—The trustee shall complete those contractural commitments of the debtor relating to transactions in securities which were made in the ordinary course of debtor's business and which were outstanding on the filing date—

(1) in which a customer had an interest, except those commitments the completion of which the Commission shall have determined by rule or regulation not to be in the public interest, or

(2) in which a customer did not have an interest, to the extent that the Commission shall by rule or regulation have determined the completion of such commitments to be in the public interest.

For purposes of this subsection (but not for any other purpose of this chapter) (i) the term "customer" means any person other than a broker or dealer, and (ii) a customer shall be deemed to have had an interest in a transaction if a broker participating in the transaction was acting as agent for a customer, or if a dealer participating in the transaction held a customer's order which was to be executed as a part of the transaction. All property at any time received, acquired, or held by or for the account of the debtor (except for cash or securities that are specifically identifiable as the property of particular customers and are not the subject of an open contractual commitment), and all property in the single and separate funds shall be available to complete open contractual commitments pursuant to this subsection. Securities purchased or cash received by the trustee upon completion of any such commitment shall constitute specifically identifiable property of a customer to the extent that such commitment was completed with property which constituted specifically identifiable property of such customer on the filing date, or was paid or delivered by or for the account of such customer to the debtor or the trustee after the filing date.

(e) *Notice.*—Promptly after his appointment, the trustee shall cause notice of the commencement of proceedings under this section to be published in accordance with a designation of the court, made in accordance with the requirements of section 51 of Title 11, and at the same time shall cause to be mailed a copy of such notice to each of the customers of the debtor as their addresses shall appear from the debtor's books and records. Except as the trustee may otherwise permit, claims for specifically identifiable property (other than securities registered in the name of the claimant or segregated for him in his individual name) or claims payable from property in the single and separate fund or payable with moneys advanced by SIPC, shall not be paid other than from the general estate of the debtor unless filed within such period of time (not exceeding sixty days after such publication) as may be fixed by the court, and no claim shall be allowed after the time specified in section 93 of Title 11. Subject to the foregoing, and without limiting the powers and duties of the trustee to discharge promptly obligations as specified in this section, the court may make appropriate provision for proof and enforcement of all claims against the debtor including those of any subrogee.

(f) *SIPC advances to trustee.—*

(1) *Advances for customers' claims.*—In order to provide for prompt payment and satisfaction of the net equities of customers of debtor, SIPC shall advance to the trustee such moneys as may be required to pay or otherwise satisfy claims in full of each customer, but not to exceed $50,000 for such customer; except that—

(A) insofar as all or any portion of the net equity of a customer is a claim for cash, as distinct from securities, the amount advanced by reason of such claim to cash shall not exceed $20,000;

(B) a customer who holds accounts with the debtor in separate capacities shall be deemed to be a different customer in each capacity;

(C) no such advance shall be made by SIPC to the trustee to pay or otherwise satisfy, directly or indirectly, any claims of any customer who is a general partner, officer, or director of the debtor, the beneficial owner of 5 per centum or more of any class of equity security of the debtor (other than a non-convertible stock having fixed preferential dividend and liquidation rights) or limited partner with a participation of 5 per centum or more in the net assets or net profits of the debtor; and

(D) no such advance shall be made by SIPC to the trustee to pay or otherwise satisfy claims of any customer who is a broker or dealer or bank other than to the extent that it shall be established to the satisfaction of the trustee, from the books and records of the debtor or from the books and records of a broker or dealer or bank or otherwise, that claims of such broker or dealer or bank against the debtor arise out of transactions for customers of such broker or dealer or bank, in which event, each such customer of such broker or dealer or bank shall be deemed a separate customer of the debtor.

To the extent that moneys are advanced by SIPC to the trustee to pay the claims of customers, SIPC shall be subrogated to the claims of such customers with rights and priorities provided in this section.

(2) ***Other advances.***—SIPC may advance to the trustee such moneys as may be required to effectuate subsection (b) (1) (A) of this section. SIPC shall advance to the trustee such moneys as (with those available pursuant to subsection (d) of this section) may be required to effectuate subsection (d) of this section.

(g) ***Payments to customers; no proof of claim required.***—It shall be the duty of the trustee to discharge promptly, in accordance with the provisions of this section, all obligations of the debtor to each of its customers relating to, or net equities based upon, securities or cash by the delivery of securities or the effecting of payments to such customer (subject to subsection (f) (1) of this section, to the extent that such payments are made out of advances from SIPC under such subsection) insofar as such obligations are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee, whether or not such customer shall have filed formal proof of such claim. For that purpose the court among other things shall—

(1) in respect of claims relating to securities or cash, authorize the trustee to make payment out of moneys made available to the trustee by SIPC notwithstanding the fact that there shall not have been any showing or determination that there are sufficient funds of the debtor available to make such payment; and

(2) in respect of claims relating to, or net equities based upon, securities of a class and series of an issuer, which are ascertainable from the books and records of the debtor or are otherwise established to

> the satisfaction of the trustee, authorize the trustee to deliver securities of such class and series if and to the extent available to satisfy such claims in whole or in part, with partial deliveries to be made pro rata to the greatest extent considered practicable by the trustee.

Any payment or delivery of property pursuant to this subsection may be conditioned upon the trustee requiring claimants to excute in a form to be determined by the trustee, appropriate receipts, supporting affidavits, and assignments, but shall be without prejudice to the right of any claimant to file formal proof of claim within the period specified in subsection (e) of this section for any balance of securities or cash to which he may deem himself entitled.

(h) *Proof of claim by associates and others.*—The provisions of this section permitting discharge of obligations of the debtor to pay cash or to deliver securities without formal proof of claim shall not apply to any person "associated" with the debtor as defined in section 78c(a) (18) of this title, to any beneficial owner of 5 per centum or more of the voting stock of the debtor, or to any member of the immediate family of any of the foregoing.

(i) *Reports by trustee to court.*—All reports to the court by a trustee (other than reports required to be filed pursuant to section 567(3) of Title 11) shall be in such form and detail as, having due regard to the requirements of section 78q of this title and the rules and regulations thereunder and the magnitude of items and transactions involved in connection with the operations of a broker or dealer, the Commission shall determine by rules and regulations to present fairly the results of such proceeding as at the dates or for the periods covered by such reports.

(j) *Effect of chapter on claims.*—Except as otherwise provided in this section, nothing in this section shall limit the right of any person to establish by formal proof such claims as such person may have to payment, or to delivery of specific securities without resort to moneys advanced by SIPC to the trustee.

* * * *

Section 7(b) §78ggg. SEC functions

(b) *Enforcement of actions.*—In the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member of SIPC, the Commission may apply to the district court of the United States in which the principal office of SIPC is located for an order requiring SIPC to discharge its obligations under this chapter and for such other relief as the court may deem appropriate to carry out the purposes of this chapter.

* * * *

Section 9 §78iii. Functions of self-regulatory organizations

(a) *Collecting agent.*—Each self-regulatory organization shall act as collection agent for SIPC to collect the assessments payable by all members of SIPC for whom such self-regulatory organization is the examining authority, and members of SIPC who are not members of any self-regulatory organization shall make payment direct to SIPC. An examining authority shall be obligated to remit to SIPC assessments made under section 78ddd of this title only to the extent that payments of such assessments are received by such examining authority.

* * * *

(c) *Inspections.*—The self-regulatory organization of which a member of SIPC is a member shall inspect or examine such member for compliance with applicable financial responsibility rules, except that if a member of SIPC is a member of more than one self-regulatory organization,

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SIPC shall designate one of such self-regulatory organizations to inspect or examine such member of SIPC for compliance with applicable financial responsibility rules. Such self-regulatory organization shall be selected by SIPC on the basis of regulatory procedures employed, availability of staff, convenience of location, and such other factors as SIPC may consider appropriate for the protection of customers of its members.

* * * *

Section 12 **§78*lll*. Definitions**

For purposes of this chapter:

(1) *Self-regulatory organization.*—The term "self-regulatory organization" means a national securities exchange or a national securities association registered pursuant to subsection (b) of section 78*o*-3 of this title.

* * * *

(3) *Examining authority.*—The term "examining authority" means, with respect to any member of SIPC, the self-regulatory organization which inspects or examines such member of SIPC or the Commission if such member of SIPC is not a member of any self-regulatory organization.

APPENDIX E

[Other Statutory and Constitutional Provisions Involved]

TENNESSEE LONG-ARM STATUTE

20-235. *Jurisdiction of persons unavailable to personal service in state—Classes of actions to which applicable.*—Persons who are nonresidents of Tennessee and residents of Tennessee who are outside the state and cannot be personally served with process within the state are subject to the jurisdiction of the courts of this state as to any action or claim for relief arising from:

(a) The transaction of any business within the state;

(b) Any tortious act or omission within this state;

(c) The ownership or possession of any interest in property located within this state;

(d) Entering into any contract of insurance, indemnity, or guaranty covering any person, property, or risk located within this state at the time of contracting;

(e) Entering into a contract for services to be rendered or for materials to be furnished in this state.

(f) Any basis not inconsistent with the constitution of this state or of the United States.

"Person" as used herein shall include corporations and all other entities which would be subject to service or process if present in this state. Any such person shall be deemed to have submitted to the jurisdiction of this state who acts in the manner above described through an agent or personal representative. ch. 67, § 1; 1972 (Adj. S.), ch. 689, § 1.

UNITED STATES CONSTITUTION

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness againt himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Supreme Court, U. S.
FILED
DEC 5 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2055

SECURITIES INVESTOR PROTECTION CORPORATION,
Petitioner,

v.

JAMES C. BARBOUR, AS RECEIVER FOR GUARANTY BOND AND SECURITIES CORPORATION AND GUARANTY BOND COMPANY, INC.,
Respondent,

and

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

PETITION FOR CERTIORARI—FILED JULY 20, 1974
CERTIORARI GRANTED—OCTOBER 21, 1974

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December 22, 1970	—Filed complaint of Securities and Exchange Commission.
January 6, 1971	—Filed Findings of Fact and Conclusions of Law—Morton, J.
January 21, 1971	—Filed application by Securities and Exchange Commission for appointment of receiver.
January 29, 1971	—Entered agreed order appointing receiver, Morton, J.
February 9, 1971	—Entered memorandum of court re appointment of receiver, Morton, J.
March 31, 1972	—Filed receiver's petition no. 22 for a show cause order.
April 6, 1972	—Entered order no. 49 that Securities and Exchange Commission and Securities Investor Protection Corporation show cause why Securities Investor Protection Act not available.
April 19, 1972	—Entered order no. 50 adjourning return date on show cause order.
May 17, 1972	—Filed answer of Securities Investor Protection Corporation (exhibits).
May 17, 1972	—Filed response of Securities and Exchange Commission (exhibits).
June 7, 1972	—Before Morton, J., hearing on order to show cause.
January 10, 1973	—Entered memorandum no. 54 dismissing Securities Investor Protection Corporation as a party—Morton, J.
February 6, 1973	—Filed receiver's motion to amend memorandum no. 54.
February 8, 1973	—Entered order no. 55 stating that memorandum no. 54 constituted the entry of a final judgment as to Securities Investor Protection Corporation.
February 9, 1973	—Filed notice of appeal by receiver.
April 23, 1974	—Filed opinion and judgment of the Court of Appeals reversing the District Court's order as to Securities Investor Protection Corporation.
July 20, 1974	—Filed petition for writ of certiorari by Securities Investor Protection Corporation with the Supreme Court of the United States.
October 21, 1974	—Filed order of Supreme Court granting petition for writ of certiorari.

SEC Complaint

IN THE

United States District Court

FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 5989

SECURITIES AND EXCHANGE COMMISSION

vs.

GUARANTY BOND AND SECURITIES CORPORATION, et al.

(Filed December 22, 1970)

1. It appears to the plaintiff that the defendants are engaged and are about to engage in acts and practices which constitute and will constitute violations of Sections 10(b), 15(b)(10), 15(c)(1), 15(c)(3) and 17(a) of the Securities Exchange Act of 1934 (Exchange Act) [15 U.S.C. 78o(b), 78o(b)(10), 78o(c)(1), 78o(c)(3) and 78q(a)], Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933 (Securities Act) [15 U.S.C. 77q(a)(2) and 77q(a)(3)] and Rules 10b-5, 15b10-5, 15c1-2, 15c1-4, 15c1-6, 15c3-1 and 17a-3 [17 CFR 240.10b-5, 15b10-5, 15c1-2, 15c1-4, 15c1-6, 15c3-1 and 17a-3] which rules were promulgated and prescribed by the plaintiff pursuant to the Exchange Act, were in effect at all times herein alleged and are now in effect. Plaintiff, pursuant to Section 21(e) of the Exchange Act [15 U.S.C.

78u(e)] and Section 20(b) of the Securities Act [15 U.S.C. 77t(b)] brings this action to enjoin such acts and practices.

2. This Court has jurisdiction of this action under Section 27 of the Exchange Act [15 USC 78aa) and Section 22(a) of the Securities Act [15 U.S.C. 77v(a)].

3. Defendant Guaranty Bond and Securities Corporation (hereinafter sometimes referred to as "registrant") is a corporation organized under the laws of Tennessee on April 16, 1962, and has its principal place of business at 2312 West End Avenue, Nashville, Tennessee. Since June 20, 1962, registrant has been and is now registered as a broker and dealer in securities pursuant to Section 15(b) of the Exchange Act [15 U.S.C. 78o(b)]. Defendant Henry Jeremiah Huey, Jr., hereinafter sometimes referred to as "H. J. Huey", is President and a director of registrant, and resides at 132 Carnavon Parkway, Nashville, Tennessee. Defendant Brooks Thomas Huey (hereinafter sometimes referred to as "B. T. Huey") is Secretary, Treasurer and a director of registrant, and resides at 6668 Jocelyn Hollow Road, Nashville, Tennessee. Defendant Guaranty Bond Company, Inc. (hereinafter sometimes referred to as "parent") is a corporation organized under the laws of Tennessee, has its principal place of business at 2312 West End Avenue, Nashville, Tennessee, and owns all of the outstanding stock of registrant. Parent is owned principally by a partnership composed of H. J. Huey and B. T. Huey.

Count One

4. During the period from approximately March 31, 1970, to the date hereof, registrant as a broker and dealer in securities, aided and abetted by the other defendants, has made and is making use of the mails and of means and instrumentalities of interstate commerce to effect transactions in and induce the purchase and sale of securities (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange while and at times when the net capital of registrant was and is less than $5,000 and its aggregate indebtedness to all other persons exceeded and exceeds two thousand (2,000) per centum of its net capital in contravention of Section 15(c)(3) of the Exchange Act [15 U.S.C. 78o(c)(3)] and Rule 15c3-1 [17 CFR 240.15c3-1].

Count Two

5. During the period from about May 1, 1969, to the date hereof, registrant, as a securities broker and dealer registered pursuant to Section 15(b) of the Exchange Act [15 U.S.C. 78o(b)], aided and abetted by the other defendants, has failed and is failing to make and keep current books and other records relating to its business in contravention of Section 17(a) of the Exchange Act [15 U.S.C. 78q(a)] and Rule 17a-3 [17 CFR 240.17a-3], in that it did not maintain a position record for all securities long and short and their locations; it did not maintain ledger accounts for customers itemizing purchases, sales, receipts and deliveries of securities for such accounts or correctly and accurately reflect the condition of such accounts; its inventory of securities was inaccurate; its income account failed to reflect all income received; its net capital computations were incorrect; and it did not have personnel questionnaires for certain associated persons.

Count Three

6. During the period from approximately May 1, 1969, to the date hereof, registrant, as a securities broker and dealer, aided and abetted by the other defendants, has made and is making use of the mails and means and instruments of interstate commerce to effect transactions in, and to induce the purchase and sale of, securities (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of manipulative, deceptive and other fraudulent devices and contrivances, practices and courses of business as specified in paragraphs numbered 7 and 8 hereof, in contravention of Section 15(c)(1) of the Exchange Act [15 U.S.C. 78o(c)(1)] and Rules 15c1-4 [17 CFR 240.15c1-4] and 15c1-6 [17 CFR 240.15c1-6].

7. Registrant, aided and abetted by the other defendants, has effected and is effecting with or for the accounts of customers transactions in, and has induced and is inducing the purchase and sale by customers of, securities (other than U. S. Tax Savings Notes, U. S. Defense Savings Stamps or U. S. Defense Savings Bonds, Series E, F and G) without at or before the completion of each such transaction giving or sending to such customers written notification disclosing: (a) whether registrant was acting as a broker for such customers, as a dealer for its own account, as a broker for some other person, or as a broker for both such customers and some other person; and (b) in cases where registrant was acting as a broker for such customers or as a broker for both such customers and some other person, either the name of the person from whom the security was purchased or to whom it was sold for such customer and the date and time when such transaction took place or the

fact that such information would be furnished upon the request of such customers, and the source and amount of any commission or other remuneration received or to be received by registrant in connection with the transaction as provided in Rule 15c1-4 [17 CFR 240.15c1-4].

8. Registrant, aided and abetted by the other defendants, as a securities broker acting for customers and for customers and other persons, has engaged and is engaging in acts designed to effect with or for the accounts of such customers, transactions in and purchases and sales by such customers of securities in the primary or secondary distributions of which registrant was and is participating and was and is financially interested without, at or before the completion of each such transaction, giving or sending to such customers written notification of the existence of such participation or interest as prescribed in Rule 15c1-6 [17 CFR 15c1-6].

Count Four

9. During the period from approximately May 1, 1969, to the date hereof, registrant, as a securities broker and dealer not a member of a national securities association, aided and abetted by the other defendants, has effected and is effecting securities transactions in contravention of Section 15(b)(10) of the Exchange Act [15 U.S.C. 78o(b)(10)] and Rule 15b10-5 [17 CFR 240.15b10-5], in that registrant exercised and is exercising discretionary power or authority for customers without such customers having given their prior written authorization to exercise such power or authority to a stated associated person or persons, and having indicated their reasons for giving such authorizations.

Count Five

10. During the period from approximately May 1, 1966, to the date hereof, registrant has been and is a securities broker and dealer engaged in the business of effecting transactions for the accounts of others and for its own account and, as such, aided and abetted by the other defendants, has made and is making use of the mails and of means and instrumentalities of interstate commerce to effect transactions in, and to induce the purchase and sale of, securities (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of manipulative, deceptive and other fraudulent devices and contrivances, including the acts, practices and courses of business specified in paragraphs numbered 6 through 14 hereof, in contravention of Section 15(c)(1) of the Exchange Act [15 U.S.C. 78o(c)(1)] and Rule 15c1-2 [17 CFR 240.15c1-2].

11. Defendants solicited and are soliciting churches and other religious institutions to employ registrant as underwriter for the public offering of their bonds under a program in which registrant guaranteed and guarantees the sale of all the bonds on the representation that registrant was and is able to make such firm commitments for the purchase and/or sale of such securities, was and is able to meet all obligations and liabilities arising in connection therewith and was and is operating within the jurisdiction of the federal and state authorties charged with regulating the securities industry, when in fact registrant was and is unable to meet the net capital requirements of Section 15(c)(3) of the Exchange Act [15 U.S.C. 78o(c)(3)] and Rule 15c3-1 [17 CFR 240.15c3-1], registrant's report on Form 17A-5 as of March 31, 1970, filed with the Commission, was misleading in that it failed to accurately reflect registrant's assets and liabilities and indicated that registrant had sufficient net capital to meet the requirements of said Rule, registrant omitted and is omitting to disclose to, and concealed and is concealing from, issuers for which it acted and is acting as underwriter its financial condition and its inability to meet the financial responsibility requirements of Rule 15c3-1 [17 CFR 240.15c3-1] and its failure to comply with applicable federal laws and regulations relating to the securities industry as alleged in paragraphs numbered 4 through 16 hereof.

12. Defendants have induced and are inducing churches and other religious institutions (hereinafter sometimes referred to as "borrowers") to execute underwriting agreements of Rule 15c3-1 [17 CFR 240.15c3-1] and its failure their bonds and custodian of funds received from sales thereof and which contain a provision that registrant may invest such funds in religious institutional bonds for such borrowers, as necessary, liquidate such investments, make disbursements and deliver funds for payment of such borrowers' obligations incurred in their construction and other programs, and return to such borrowers 5% simple interest earned on such funds. On the basis of this general authority defendants have exercised and are exercising discretionary authority over funds received from sales of bonds issued by such borrowers and over such borrowers' accounts with registrant, effecting transactions therewith and therein, including sales to such borrowers of bonds issued by other churches and religious institutions having maturities of from one to fourteen years, without sending to such borrowers confirmations advising them of the securities sold to them and placed in their accounts, the date

and amount of each such transaction and the source and amount of commission and other remuneration received or to be received by defendants in connection with each such transaction. Registrant has credited and is crediting to the accounts of such borrowers only 5% simple interest on the amounts invested for such borrowers in the bonds of other churches and religious institutions even though the interest rates on the bonds placed in such borrowers' accounts have been and are considerably greater and defendants have retained and treated and are retaining and treating as income to registrant the interest differential between the 5% rate paid to such borrowers and the substantially higher yields on the bonds placed in their accounts, thus obtaining secret profits from such borrowers while acting in the capacity of their agent, custodian and fiduciary. Registrant has been and is, in some instances, investing funds held as custodian for a particular religious institution in such institution's own bonds with the result that the institution pays interest on such bonds at a rate in excess of 5% per annum but receives a credit to its account with registrant of only 5% per annum, registrant retaining the interest differential as a secret profit.

13. During the period from about May 1, 1966, to the date hereof, registrant, as a securities broker and dealer, aided and abetted by the other defendants, solicited and is soliciting churches and other religious institutions to employ registrant as underwriter of their bonds and has solicited and is soliciting investors to purchase such bonds, on the representations that the sale of all bonds so underwritten by registrant is guaranteed by it and that registrant will purchase or sell any bonds remaining after the church has put forth its best effort, without disclosing that registrant had placed and is placing a substantial portion

of such bonds in the accounts of other churches and religious institutional issuers for which it was and is acting as underwriter and for which it is holding funds as custodian by recording buy and sell transactions in securities on registrant's books between various of such religious institutions; that availability of funds for a particular issuer's construction or other program could be dependent upon registrant's ability to dispose of securities in which such funds were thus invested; that there is no independent market for such securities; and that issuers whose funds are invested by registrant in securities of other institutions may bear the risk of loss resulting from default or failure of an issuer of a security in which their funds are invested.

14. During the period from about May 1, 1966, to the date hereof, registrant, as a securities broker and dealer, aided and abetted by the other defendants, offered and is offering to sell and sold and is selling religious institutional bonds through the use of prospectuses prepared by registrant which are materially false and misleading in that each contained the representation that the proceeds from the sales of the religious institutional bonds described therein shall be disbursed by registrant in accordance with the purposes of the bond issue as set out in the particular prospectus—i.e. for such expenditures as consolidation and retirement of existing indebtedness, purchase of land for new buildings, and construction, expansion and remodeling of churches, sanctuaries, educational buildings and other facilities—without disclosing: That such proceeds would be turned over to registrant as custodian; that registrant in its discretion would invest them in other religious institution bonds having extended maturites of from one to fourteen years; the amounts of such proceeds to be paid to

registrant and the other defendants as fees, commissions and other remunerations; and the use by registrant of such proceeds in completing other underwritings in which it and the other defendants would receive substantial fees, commissions and other remunerations.

Count Six

15. During the period from about May 1, 1966, to the date hereof, registrant, as a securities broker and dealer, aided and abetted by the other defendants, by use of means and instrumentalities of interstate commerce and of the mails, directly and indirectly, used and employed and is using and employing manipulative and deceptive devices and contrivances in contravention of Section 10(b) of the Exchange Act [15 U.S.C. 78j(b)] and Rule 10b-5 [17 CFR 240.10b-5], in that registrant was and is:

(a) Engaging in acts, practices and courses of business which operated and would operate as a fraud and deceit upon customers of registrant as described more particularly in paragraphs 11 through 14 of Count Five hereof;

(b) Making untrue statements of material facts, namely, the statements set forth in paragraphs 11 through 14 of Count Five hereof; and

(c) Omitting to state the facts specified in paragraphs 11 through 14 of Count Five hereof relating to registrant's financial condition, its lack of sufficient capital to meet the requirements of the federal laws and rules relating to financial responsibilities of securities brokers and dealers, its mode of operations, its secret profits from transactions in discretionary accounts, and details of transactions in which funds and securities were transferred between accounts of customers on the books of registrant, which facts were material in order to make the statement made, in the light of the circumstances under which they were made, not misleading.

Count Seven

16. During the period from about May 1, 1966, to the date hereof, in contravention of Sections 17(a)(2) and 17 (a)(3) of the Securities Act of 1933 [15 U.S.C. 77q(a)(2) and (3)], registrant, as a securities broker and dealer, aided and abetted by the other defendants, in offers and sales of securities by use of means and instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly:

(a) Obtained money and property by means of the untrue statements of material facts as set forth in paragraphs 11 through 14 of Count Five hereof;

(b) Obtained money and property by means of the omissions to state material facts as set forth in paragraphs 11 through 14 of Count Five hereof, which facts were necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and

(c) Engaged in the transactions, practices and courses of business described in paragraphs 11 through 14 of Count Five hereof, which operated and would operate as a fraud and deceit upon the purchasers of such securities.

17. Defendants will unless restrained and enjoined continue to engage in the acts and practices set forth in this complaint.

Wherefore, the plaintiff demands:

A. A preliminary injunction and a final judgment enjoining defendant Guaranty Bond and Securities Corporation, its officers, agents, servants, employees and attorneys, and each of them, from, and defendants Henry Jeremiah Huey, Jr., Brooks Thomas Huey and Guaranty Bond Co., Inc., their officers, agents, servants, employees and attorneys, and each of them, from aiding and abetting defendant Guaranty Bond and Securities Corporation in:

(1) Making use of the mails or any means or instrumentality of interstate commerce to effect transactions in or to induce the purchase or sale of securities (other than an exempted security, or commercial paper, bankers' acceptances or commercial bills) otherwise than on a national securities exchange, while and at a time when the net capital of registrant is less than $5,000 and its aggregate indebtedness to all other persons exceeds two thousand (2,000) per centum of its net capital in contravention of Section 15(c)(3) of the Exchange Act [15 U.S.C. 78o(c)(3)] and Rule 15c3-1 [17CFR 240.15c3-1] thereunder.

(2) Failing to make and keep current books and records of registrant relating to its business as a securities broker and dealer registered pursuant to Section 15 of the Exchange Act [15 U.S.C. 78o] in contravention of Section 17(a) of the Exchange Act [15 U.S.C. 78q(a)] and Rule 17a-3 [17 CFR 240.17a-3] thereunder.

(3) Making use of the mails and means and instrumentalities of interstate commerce to effect transactions in, and to induce the purchase and sale of, securities (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange by:

(a) Effecting with or for the accounts of customers transactions in and inducing the purchase or sale by customers of securities (other than U.S. Treasury Savings Notes, U. S. Defense Savings Stamps or U. S. Defense Savings Bonds, Series E, F and G), without registrant at or before the completion of each such transaction giving or sending to the customer a written notification disclosing the information prescribed in Rule 15c1-4 [17 CFR 240.15c1-4] in contravention of Section 15(c)(1) of the Exchange Act [15 U.S.C. 78o(c)(1)];

(b) Engaging in acts designed to effect with or for the accounts of customers for whom registrant is acting, any transaction in, or purchase or sale of, a security in the primary or secondary distribution of which registrant is participating, or is otherwise financially interested, without registrant at or before the completion of each such transaction giving or sending to the customer written notification of the existence of such participation or interest as prescribed in Rule 15c1-6 [17 CFR 15c1-6] in contravention of Section 15(c)(1) of the Exchange Act [15 U.S.C. 78o(c)(1)].

(4) Effecting transactions in, or inducing the purchase or sale of, any security (otherwise than on a national securities exchange) in which registrant, while a nonmember broker or dealer, shall exercise any discretionary power or authority for any customer unless such customer has given prior written authorization to exercise such power and authority to a stated associated person or persons and has indicated the reasons for such authorization as provided in Rule 15b10-5 [17 CFR 15b10-5] in contravention of Section 15(b)(10) of the Exchange Act [15 U.S.C. 78o(b)(10)].

(5) Making use of the mails or of any means or instrumentalities of interstate commerce while registrant is a securities broker or dealer engaged in the business of effecting transactions in securities for the accounts of others or for its own account, to effect any transaction in, or to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of any manipulative, deceptive or other fraudulent device or contrivance in contravention of Section 15(c)(1) of the Exchange Act [15 U.S.C. 78o(c)(6)] and Rule 15c1-2 [17 CFR 240.15c1-2] thereunder, including

(a) Any act, practice or course of business which operates or would operate as a fraud or deceit upon any person in connection with:

(i) the solicitation or acceptance of underwriting agreements for the purchase and/or sale of securities while registrant is unable to meet the requirements of the net capital rule, Rule 15c3-1 [17 CFR 240.15c3-1];

(ii) the exercise of discretionary authority over the accounts of customers for the purchase and/or sale of securities;

(iii) the use of monies paid by customers for the purchase of securities or the use of funds received as proceeds from the sale of securities by issuers;

(iv) registrant's use of funds held as custodian from sales of securities for which it is acting as underwriter.

(b) Any untrue statement of a material fact or omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading concerning:

(i) the financial condition of registrant;

(ii) registrant's compliance with the requirements of federal and state laws and rules applicable to the securities industry;

(iii) service charges, fees, commissions and interest differentials received by registrant and its parent;

(iv) the use of monies paid by customers for the purchase of securities;

(v) investments of monies received from or through the sale of securities; or

(vi) benefits to registrant and/or its parent from the exercise of discretionary authority over the accounts of customers.

(6) Directly or indirectly, by use of any means or any instrumentality of interstate commerce or of the mails, to use or employ, in connection with the purchase or sale of any security, any manipulative or deceptive device or contrivance in contravention of Section 10(b) of the Exchange Act [15 U.S.C. 78j(b)] and Rule 10b-5 [17 CFR 240.10 b-5], more particularly:

(a) Engaging in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person in connection with the matters described in paragraphs (a)(i) through (iv) of Demand A(5) hereof, or engaging in any other act, practice or course of business of similar purport or object which operates or would operate as a fraud or deceit upon any person;

(b) Making any untrue statement of a material fact or omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading concerning the matters described in paragraphs (b)(i) through (b)(vi) of Demand A(5) hereof, or making any other untrue statement of a material fact or omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading similar to those specifically referred to herein above or of similar purport or object.

(7) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails, in the offer or sale of any security, directly or indirectly:

(a) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading concerning the matters specified in paragraphs (b)(i) through (b)(v), inclusive, of Demand A(5), hereof, or any other untrue statement or omission of similar purport or object;

(b) To engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon any purchaser in connection with the matters described in paragraphs (a)(i) through (a)(iv), inclusive, of Demand A(5) hereof, or to engage in any other transaction, practice or course of business of similar purport or object which operates or would operate as a fraud or deceit upon the purchaser.

B. Such other and further relief as the nature of the case may require and as this Court may deem proper.

Jule B. Greene
J. Cecil Penland
Jennie H. Randolph
John M. Kelly
Attorneys for the Securities and Exchange Commission
Suite 138, 1371 Peachtree Street, N.E.
Atlanta, Georgia 30309

Application for Appointment of Receiver

IN THE

UNITED STATES DISTRICT COURT

For the Middle District of Tennessee

Nashville Division

[Caption Omitted]

(Filed January 21, 1971)

Plaintiff applies to the Court for an order appointing a receiver for defendant Guaranty Bond and Securities Corporation (registrant) and all funds, securities and other assets and property of, belonging to, or in possession of it and authorizing, empowering and directing such receiver to collect, take possession of and take charge of all and singular thereof, to hold the same subject to the further order of the Court, to obtain an accounting of all funds and securities entrusted by customers and other persons to registrant and with the usual powers of receivers.

As grounds therefor plaintiff states that receivership of registrant is apparently the only remedy that will adequately protect the interests of the churches and other religious institutions for which registrant has been acting as underwriter and the interests of the other customers and creditors of registrant.

Jule B. Greene
J. Cecil Penland
Jennie H. Randolph
Attorneys for Securities and Exchange Commission
Suite 140
1371 Peachtree Street N.E.
Atlanta, Georgia 30309

Receiver's Petition No. 22

IN THE

UNITED STATES DISTRICT COURT

For the Middle District of Tennessee

Nashville Division

[Caption Omitted]

(Filed March 31, 1972)

Petitioner, James C. Barbour, Receiver, would respectfully show to the Court that:

1. Shortly after his appointment, he was advised by a representative of the Atlanta Regional Office of plaintiff, Securities and Exchange Commission, that customers of Guaranty Bond and Securities Corporation might be entitled to protection under the provisions of the Securities Investor Protection Act of 1970 (15 USCA ¶¶78 aaa, et seq.).

2. On or about May 5, 1971, plaintiff's representative mentioned the matter to petitioner again and stated that the Atlanta Regional Office had transmitted to its Washington Office the required notice under the statute but that it might have been delayed in reaching the Securities Investors Protection Corporation (hereinafter referred to as SIPC).

3. Thereupon petitioner instructed his attorney to make inquiry of SIPC and to demand protection under the Act. A copy of the letter addressed to Honorable Byron D. Woodside, Chairman, with copy to Mr. Jule B. Greene and

Mr. J. Cecil Penland, Securities and Exchange Commission in Atlanta, Georgia is made Exhibit No. 1 hereto.

4. During the next several months the Receiver and his attorney supplied voluminous information and a long list of documents requested by the corporation, including an opinion of petitioner's attorney with respect to application of the Act to the instant proceeding. A copy of the letter to Mr. Theodore Focht, General Counsel of SIPC dated June 24, 1971 is made Exhibit No. 2 hereto.

5. By letter dated October 5, 1971, the General Counsel indicated that while SIPC required certain additional information, "based on the information presently available, this corporation has no plans for filing an application for the appointment of a trustee in this proceeding."

6. On November 1, 1971, in response to an inquiry from petitioner's counsel as to the basis for this determination the General Counsel advised that it involved "the question of retroactive application of the statute and the question of the ability of a SIPC trustee to carry out the purposes of the 1970 Act at this point in the liquidation of this company."

7. On November 24, 1971, the Chairman of SIPC advised that the "protections provided by that Act are not unlimited, however, and we are of the present opinion that the limitations contained in the Act make it necessary for this Corporation to decline to intervene in the Guaranty Bond and Securities case."

8. Petitioner's counsel then wrote to plaintiff's Regional Office in Atlanta in an effort to determine the date upon which it had advised its Washington Office of the possible application of the Act to Guaranty Bond and Securities Corporation but the letter was forwarded to the Washington Office for reply and petitioner has been unable to obtain any information as to whether or not and on what date notice was given by plaintiff to SIPC as required by the statute.

9. Petitioner is advised and believes that the customers of Guaranty Bond and Securities Corporation are entitled to the protection of the Act. Guaranty Bond and Securities Corporation was a registered broker dealer when the Act took effect on December 30, 1970 and engaged in the investment and securities business until at least January 6, 1971 when a temporary injunction was entered herein at the request of plaintiff.

10. Plaintiff had a statutory duty under § 5(a)(1) of the Act to notify SIPC that Guaranty Bond and Securities Corporation was in or was approaching financial difficulty on on about December 30, 1970 when the Act took effect since it had already filed the Complaint in the instant action on December 22, 1970 alleging among other things that the broker dealer was in violation of net capital requirements established under SEC regulations.

11. If so notified, SIPC had an opportunity to intervene in the present proceeding before the injunction was issued and before the appointment of a Receiver. Even after the appointment of petitioner as Receiver, SIPC had the opportunity to intervene and seek the appointment of a Trustee under the Act as it has done in other proceedings, including one action pending in this Court.

12. If SIPC was not notified of the financial difficulties of Guaranty Bond and Securities Corporation, it was because of the failure of plaintiff to discharge its statutory

duty and not because of any neglect on the part of petitioner.

13. While the Receiver has done everything within his power to protect the interests of the customers of Guaranty Bond and Securities Corporation, including the return of their bonds and excess credit balances, it appears that such customers will sustain a loss at least equal to that portion of the 5% reserve fund established under Order No. 22 herein which may be required in order to defray part of the costs, fees and expenses of this receivership.

14. SIPC is subject to the jurisdiction of this Court because it is engaged in business in the Middle District of Tennessee in that it collects assessments under the Act from broker dealers operating in the District.

Wherefore, Premises Considered, Petitioner Prays:

1. That a copy of this Petition be served upon plaintiff and SIPC and that an Order be entered requiring respondents to show cause on or before a day certain why SIPC should not be required to intervene herein and afford to the customers of Guaranty Bond and Securities Corporation the benefits of the Act.

2. For general relief.

James C. Barbour
Receiver

W. Ovid Collins, Jr.
Attorney for the Receiver

State of Tennessee }
County of Davidson }

James C. Barbour, being first duly sworn, makes oath that the statements contained in his foregoing Petition are true to the best of his knowledge, information and belief.

James C. Barbour

Sworn to and subscribed before me this 30th day of March, 1972.

Patricia R. Sills
Notary Public

My Commission Expires: November 24, 1974

EXHIBIT NO. 1

May 27, 1971

Honorable Byron D. Woodside, Chairman
Securities Investors Protection Commission
500 North Capitol Street
Washington, D. C. 20549

Re: Guaranty Bond and Securities Corporation

Dear Sir:

The undersigned is attorney for James C. Barbour, Receiver for the above named registered dealer pursuant to appointment on January 29, 1971 by the United States District Court for the Middle District of Tennessee, Nashville Division, in the cause styled Securities and Exchange Commission v. Guaranty Bond and Securities Corporation, et al., Civil Action No. 5989.

It appears that the registrant qualifies as a member of the Securities Investor Protection Corporation under Section 3(a) (2) (A) of the Securities Investor Protection Act of 1970. While the District Court proceeding was filed without reference to the Act, there has been a finding of insolvency by the District Judge and the cause has pursued a course very similar to that contemplated by the Act, including the distribution of identifiable securities to their owners.

It further appears, however, that investors will lose some portion of their net equities in money credit balances and this letter is to make application to the Commission for assistance and such advances to the Receiver as may be required to satisfy the claims of each customer within the limitations of the Act.

We will, of course, be happy to supply such additional information as you may request and we will appreciate your acknowledging receipt of this letter as a claim on behalf of the Receiver.

Yours very truly

W. Ovid Collins, Jr.

WOC:kc

cc: Mr. James C. Barbour, Receiver
Guaranty Bond and Securities Corporation
2312 West End Avenue
Nashville, Tennessee 37203

Mr. Jule B. Greene
Mr. J. Cecil Penland
Securities and Exchange Commission
Suite 138
1371 Peachtree Street, N.E.
Atlanta, Georgia 30309

EXHIBIT NO. 2

June 24, 1971

Mr. Theodore Focht
Securities Investor Protection Corporation
Suite 104 Astral Building
955 North L'Enfant Plaza, S.W.
Washington, D. C. 20024

Re: Guaranty Bond and Securities Corporation
Civil Action No. 5989

Dear Mr. Focht:

In accordance with your telephone conversation on June 21, 1971 with Mr. James C. Barbour, Receiver for Guaranty Bond and Securities Corporation, I am writing this letter as a statement of facts which in my opinion justifies the conclusion that the Securities Investor Protection Act of 1970 is applicable to the above proceeding.

Guaranty Bond and Securities Corporation is a registered broker-dealer and therefore automatically a member of the Securities Investor Protection Corporation.

It has been declared insolvent and is in receivership in the United States District Court for the Middle District of Tennessee, Nashville Division.

While all securities on hand have been delivered or tendered to the registrant's investors and customers, they were required to deposit 5% of the face amount of the securities in a reserve fund, some part of which will necessarily be utilized for the payment of the costs of the receivership since the assets of the insolvent corporation are not sufficient.

It thus appears that the investors and customers will lose a portion of their equity in cash and it is my understanding of the Act that it is designed to protect them against such a loss. The Receiver can be designated as Trustee and given the powers, duties and responsibilities set forth in the Act. If the necessary funds are advanced to the Trustee, reimbursement may be made to the investors and customers at this time of the 5% deposit made by each and at the conclusion of the receivership proceeding, the Securities Investor Protection Corporation will be reimbursed by that portion of the reserve fund remaining unexpended.

I trust that the foregoing is in compliance with your request but if further information or statements are required, lease advise.

Yours very truly

W. Ovid Collins, Jr.

WOC:kc
cc: Mr. James C. Barbour, Receiver

Order No. 49

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 5989

SECURITIES AND EXCHANGE COMMISSION

vs.

GUARANTY BOND AND SECURITIES CORPORATION, et al.

(Entered April 6, 1972)

This cause came on to be heard under the Receiver's Petition No. 22 alleging that the customers of Guaranty Bond and Securities Corporation are entitled to the protection and benefits afforded by the Securities Investor Protection Act of 1970 (15 USCA §§ 78aaa, et seq.) when, it appearing to the Court that the question as to the applicability of the Act should be adjudicated without undue delay.

It is Ordered that plaintiff, Securities and Exchange Commission, and the Securities Investors Protection Corporation be served with a copy of the Petition and that they show cause, if any they have, on or before the 20th day of April, 1972 at 9:00 o'clock A.M. why the remedies afforded by the Act should not be made available in this proceeding.

/s/ L. CLURE MORTON
United States District Judge

Approved for Entry:

W. OVID COLLINS, JR.
Attorney for the Receiver

Answer of the Securities Investor Protection Corporation

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[CAPTION OMITTED]

(Filed: May 17, 1972)

Respondent, Securities Investor Protection Corporation (hereinafter sometimes referred to as "SIPC"), for answer to Petition No. 22 herein, respectfully alleges and shows to the Court as follows:

1. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "1," "2," "8" and "13" of the petition herein.

2. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "3" of the petition herein, except admits that it received the letter referred to therein, a copy of which is attached thereto as Exhibit No. 1.

3. Denies each and every allegation contained in paragraph "4" of the petition herein, except admits that it received certain information and papers from the petitioner or his attorney, and further admits that it received the letter referred to therein, a copy of which it attached thereto as Exhibit No. 2.

4. Answering the allegations contained in paragraph "5" of the petition herein, admits that its General Counsel sent a letter dated October 5, 1971 to the attorney for the petitioner herein, a copy of which is hereto annexed as Exhibit A, but otherwise denies each and every allegation contained in said paragraph "5."

5. Answering the allegations contained in paragraph "6" of the petition herein, admits that its General Counsel sent a letter dated November 1, 1971 to the attorney for the petitioner herein, a copy of which is hereto annexed as Exhibit B, but otherwise denies each and every allegation contained in said paragraph "6."

6. Answering the allegations contained in paragraph "7" of the petition herein, admits that its Chairman sent a letter dated November 24, 1971 to the Honorable William E. Brock, Jr., a copy of which is hereto annexed as Exhibit C, but otherwise denies each and every allegation contained in said paragraph "7."

7. Answering the allegations contained in paragraph "9" of the petition herein, admits that a temporary injunction against the defendants was entered herein at the plaintiff's request on or about January 6, 1971, but otherwise denies it has knowledge or information sufficient to form a belief with respect to the truth of the remaining allegations contained in said paragraph "9," including the petitioner's alleged advice and belief regarding the protection available to customers of Guaranty Bond and Securities Corporation (hereinafter referred to as "Guaranty Bond").

8. Admits each and every allegation contained in paragraph "10" of the petition herein, except alleges that Guaranty Bond was in or was approaching financial difficulty on a date substantially prior to December 30, 1970.

9. Denies each and every allegation contained in paragraph "11" of the petition herein.

10. Admits each and every allegation contained in paragraph "12" of the petition herein, except denies that SIPC's lack of timely knowledge or notice of the financial difficulties of Guaranty Bond was not attributable to the neglect or other act or omission on the part of petitioner.

11. Denies each and every allegation contained in paragraph "14" of the petition herein, except admits that it receives payments upon assessments from certain broker-dealers doing business in the Middle District of Tennessee.

First Defense

12. The petition fails to state a claim against SIPC upon which relief can be granted.

Second Defense

13. Upon information and belief, on December 30, 1970 and prior thereto Guaranty Bond was guilty of numerous substantial violations of the Securities Exchange Act of 1934 ("Exchange Act") and the Securities Act of 1933 ("Securities Act"), and rules promulgated thereunder, more particularly violations of sections 10(b), 15(b)(10), 15(c)(1), 15(c)(3) and 17(a) of the Exchange Act, sections 17(a)(2) and 17(a)(3) of the Securities Act, and Rules 10b-5, 15b10-5, 15c1-2, 15c1-4, 15c1-6, 15c3-1 and 17a-3 promulgated thereunder.

14. Upon information and belief, as a result of the violations aforesaid on or about December 22, 1970 the plaintiff herein commenced an action to enjoin Guaranty Bond from the commission of further violations, and to enjoin the other defendants herein from aiding or abetting Guaranty Bond in the commission thereof. On or about January 6, 1971 this Court granted a preliminary injunction as prayed for in the plaintiff's complaint.

15. Upon information and belief, in granting the aforesaid preliminary injunction this Court made and filed its Findings of Fact and Conclusions of Law, a copy of which is hereto annexed as Exhibit D, which Findings of Fact and Conclusions of Law are hereby incorporated herein by reference.

16. Upon information and belief, on December 30, 1970 and prior thereto Guaranty Bond's violation of Section 15(c)(3) of the Exchange Act, and Rule 15c3-1 promulgated thereunder, was substantial and impossible of correction by Guaranty Bond, and its capital deficiency exceeded three million dollars.

17. Upon information and belief, on December 30, 1970 and prior thereto Guaranty Bond was in or was approaching serious financial difficulty, and had failed or was in danger of failing to meet its obligations to its customers.

18. By reason of the foregoing, the Securities Investor Protection Act of 1970 (84 Stat. 1636; Public Law 91-598, 91st Congress, H. R. 19333) (hereinafter referred to as the "1970 Act") does not apply to Guaranty Bond, and the remedies and benefits provided therein may not be invoked by, or for the benefit of, its customers or any other person.

Third Defense

19. Repeats and realleges each and every allegation hereinabove contained in paragraph "14."

20. Upon information and belief, on January 27, 1971 this Court made an order appointing the petitioner as receiver for Guaranty Bond and its parent, Guaranty Bond Co., Inc. (hereinafter referred to as "Guaranty Bond's Parent"), and conferring upon said receiver the powers, authority, rights and obligations therein contained. In that order the court found, in part, that receivership was the only remedy that would adequately protect the interests of churches and other religious institutions for which Guaranty Bond had been acting as underwriter, and the interests of other customers and creditors of both corporations. A copy of that order is hereto annexed as Exhibit E and incorporated herein by reference.

21. Upon information and belief, in making the aforesaid order the Court handed down its Memorandum Decision dated January 27, 1971, a copy of which is hereto annexed as Exhibit F and incorporated herein by reference. In that decision the Court found as facts, among other things, that both defendant corporations could not pay their obligations as they matured, could not pay their current obligations, and further found that their liabilities far exceeded their realizable assets. As that decision recites, in the course of the hearing the corporate defendants unsuccessfully sought leave to proceed under Chapter X of the Bankruptcy Act, and in that connection admitted that no new capital could be obtained by them, that their bank accounts had already been applied to outstanding debts due their bank, that they had no funds with which to pay their obligations, current

or otherwise, and that there were no lawful methods to obtain other funds.

22. Upon information and belief, on December 30, 1970 and prior thereto Guaranty Bond was insolvent within the meaning of Section 1(19) of the Bankruptcy Act, or was unable to meet its obligations as they matured, or both.

23. By reason of the foregoing, the 1970 Act does not apply to Guaranty Bond, and the remedies and benefits provided therein may not be invoked by, or for the benefit of, its customers or any other person.

Fourth Defense

24. Repeats and realleges each and every allegation hereinabove contained in paragraphs "13" through "23" inclusive.

25. By reason of the foregoing, the 1970 Act does not apply to Guaranty Bond, and the remedies and benefits provided therein may not be invoked by, or for the benefit of, its customers or any other person.

Fifth Defense

26. Repeats and realleges each and every allegation hereinabove contained in paragraphs "13" through "17" inclusive, and paragraphs "20" through "22" inclusive.

27. Upon information and belief, at or about the time of his appointment as receiver herein on or about January 27, 1971, the petitioner knew of the existence and provisions of the 1970 Act, as admitted by him in paragraph "1" of the petition herein, and had full opportunity to make a prompt determination respecting the applicability thereof in the circumstances of this case and take appropriate legal or other action to invoke the 1970 Act procedures and remedies.

28. Despite his aforesaid knowledge or notice of the 1970 Act, the petitioner herein elected to execute the duties of his office as receiver and to proceed with the administration and liquidation of Guaranty Bond and Guaranty Bond's Parent.

29. Upon information and belief, the receivership herein embraces both Guaranty Bond and Guaranty Bond's Parent, and the proceedings taken herein relate to the assets and liabilities of both corporations and the liquidation thereof although Guaranty Bond's Parent was not at any time material herein a broker or dealer within the meaning of the 1970 Act or the Exchange Act.

30. On or about May 31, 1971 SIPC received a letter dated May 27, 1971 from the attorney for the receiver herein, a copy of which is hereto annexed as Exhibit G and incorporated herein by reference. Prior thereto SIPC had no knowledge or notice of any of the facts, matters or proceedings hereinabove alleged in paragraphs "13" through "29" inclusive, or any other matters relating to the financial condition of Guaranty Bond or its ability to meet its obligations to its customers or other creditors, or any other matters relating to the administration and proceedings by the petitioner as receiver herein.

31. SIPC's lack of notice or knowledge as aforesaid was not the result of any act or omission on its part, but was caused solely by the failure of others having knowledge of the facts, including the receiver herein, to give SIPC timely notice thereof.

32. Prior to the time SIPC acquired its first notice or knowledge of the circumstances and proceedings herein and had an opportunity to determine its responsibilities, if any, in the circumstances, the receivership herein had progressed to a point of substantial completion, including but not limited to the disposition of various assets belonging to the defendant corporations or certain principals thereof, the return of all or substantially all of the securities in the possession or under the control of the corporate defendants, the resolution of certain claims made against the estates herein, the establishment of a reserve fund to be applied in payment of the expenses of administration, and the approval of a plan for partial liquidation. SIPC begs leave to refer to all of the petitions, orders, decisions, findings of fact and conclusions of law, and other documents and other matters and proceedings which are a matter of record in this Court establishing the status of the receiver's proceedings at a time or at times material to this defense.

33. At no times were the acts, transactions, powers, liabilities or responsibilities of the receiver herein governed or controlled by the 1970 Act.

34. By reason of the foregoing, subsequent to its acquisition of knowledge or notice of the financial difficulties of Guaranty Bond or of the proceedings heretofore had herein, SIPC had no legal right to take any action under the 1970 Act for the protection of customers or other creditors of Guaranty Bond because of the impossibility of accomplishing the purposes of the 1970 Act including the proper liquidation of Guaranty Bond only by a duly appointed trustee in accordance with the terms and provisions of the 1970 Act.

Sixth Defense

35. Repeats and realleges each and every allegation hereinabove contained or realleged in paragraphs "26" through "34" inclusive.

36. Under the 1970 Act SIPC is vested with discretion to determine whether, in a particular case, it shall make an application for a decree adjudicating that customers of a broker-dealer, which is a member of SIPC, are in need of the protection provided by the 1970 Act, and upon such adjudication apply for the appointment of a trustee to liquidate such broker-dealer in accordance with the terms of the 1970 Act.

37. Even if SIPC had the legal authority under the 1970 Act, in the circumstances of this case, to invoke the provisions of the said Act and initiate the procedures therein provided for the protection of customers, which it denies as hereinabove alleged, nevertheless its decision not to do so was a fully justified, proper and required exercise of the discretion vested in SIPC under the 1970 Act as aforesaid, and may not be lawfully superseded or set aside in the circumstances of this case by an order or decree compelling it now to proceed under the 1970 Act.

Seventh Defense

38. This Court lacks jurisdiction in this proceeding.

Wherefore, respondent Securities Investor Protection Corporation demands judgment dismissing the petition herein.

Theodore H. Focht
General Counsel
Securities Investor Protection Corporation
485 L'Enfant Plaza, S. W.
Washington, D. C. 20024
Telephone: 202—484-5400

Dated: Washington, D. C., May 15, 1972.

EXHIBIT A

October 5, 1971

W. Ovid Collins, Jr., Esquire
Cornelius, Collins, Higgins & White
Third National Bank Building
Nashville, Tennessee 37219

Re: Guaranty Bond and Securities Corporation,
Your File No. 5989

Dear Mr. Collins:

This is in response to your letter of September 23, 1971, addressed to Chairman Woodside with regard to Guaranty Bond and Securities Corporation.

As you are aware, the staff of this Corporation has been reviewing this matter for some time, and we have attempted to gather together pertinent information and data. Although we still do not have certain information which would be very helpful to us, for example, information with respect to investigations of the activities of the principals of this company and any reports made by the Receiver on those matters, we can understand your interest in learning the intentions of this Corporation with respect to this company.

Based on the information presently available, this Corporation has no plans for filing an application for the appointment of a Trustee in this proceeding.

Very truly yours

Theodore H. Focht
General Counsel

THF:py

EXHIBIT B

November 1, 1971

W. Ovid Collins, Jr., Esquire
Cornelius, Collins, Higgins & White
Third National Bank Building
Nashville, Tennessee 37218

Dear Mr. Collins:

This is in response to your recent letter inquiring as to the basis for this Corporation's determination that it should not intervene in the matter of Guaranty Bond and Securities Corporation.

There are a number of reasons for our determination, and they are complex and interrelated. Briefly, I would say they involve the question of retroactive application of the statute and the question of the ability of a SIPC trustee to carry out the purposes of the 1970 Act at this point in the liquidation of this company.

Very truly yours

Theodore H. Focht
General Counsel

THF:py

Carbon copy to Mr. James C. Barbour
936 J. C. Bradford Building
Nashville, Tennessee 37219

EXHIBIT C

November 24, 1971

The Honorable William E. Brock, Jr.
United States Senate
304 Old Senate Office Building
Washington, D. C. 20510

Re: LEG:1

Dear Senator Brock:

This is in response to your recent letter concerning Guaranty Bond and Securities Corporation.

As you are aware, the Counsel to the Receiver and the General Counsel of this Corporation have been in communication with each other concerning this matter. I believe that the intentions of this Corporation are set forth in two recent letters addressed to W. Ovid Collins, Jr., Esq., Counsel to the Receiver, from Theodore H. Focht, General Counsel for SIPC. These letters are dated October 5 and November 1, 1971, and I enclose copies of them for your information.

I note, of course, the comments contained in the last paragraph on page two of Mr. Barbour's letter. I assure you that the Directors and staff of this Corporation have made every attempt to provide protection to public customers of broker-dealer firms consistent with the provisions of the Securities Investor Protection Act of 1970. The protections provided by that Act are not unlimited, however, and we are of the present opinion that the limitations contained in the Act make it necessary for this Corporation to decline to intervene in the Guaranty Bond and Securities case.

Sincerely

Byron D. Woodside

Chairman

THF:py
Enclosures

EXHIBIT D

In the U. S. District Court for the Middle District
of Tennessee, Nashville Division

Securities & Exchange Commission
Plaintiff,
v.
Guaranty Bond and Securities Corporation, Henry Jeremiah Huey, Jr., Brooks Thomas Huey and Guaranty Bond Co., Inc., 2312 West End Avenue, Nashville, Tennessee 37203,
Defendants.

Civil Action File
No. 5989

Findings of Fact and Conclusions of Law

(Entered January 6, 1971)

This cause coming on to be heard upon plaintiff's motion for a preliminary injunction, and upon consideration of said motion, the complaint, affidavits, other evidence adduced and arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. That defendant Guaranty Bond & Securities Corporation, a Tennessee corporation, is engaged in business as a broker and a dealer in securities and for this purpose maintains an office in Davidson County, Tennessee.

2. That since June 20, 1962, defendant Guaranty Bond & Securities Corporation (hereinafter sometimes referred to

as "registrant") has been and is now registered with the Securities and Exchange Commission as a broker and a dealer in securities pursuant to Section 15(b) of the Securities Exchange Act of 1934 [15 U.S.C. 78o(b)].

3. That registrant is a wholly owned subsidiary of defendant Guaranty Bond Company, Inc., a Tennessee corporation (hereinafter sometimes referred to as "parent") with an office in Davidson County, Tennessee; and that defendant Henry Jeremiah Huey, Jr. (H. J. Huey) is President and a director and Brooks Thomas Huey (B. T. Huey) is Secretary, Treasurer and a director of both registrant and parent, and they reside in Davidson County, Tennessee.

4. That since March 31, 1970, registrant has made use of the mails and of means and instrumentalities of interstate commerce to effect transactions in and to induce the purchase and sale of securities (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange while and at times when the net capital of registrant was less than $5,000 and its aggregate indebtedness to all other persons exceeded two thousand (2,000) per centum of its net capital in contravention of Section 15(c)(3) of the Exchange Act [15 U.S.C. 78o(c)(3)] and Rule 15c3-1 [17 CFR 240.15c3-1].

5. That since about May 1, 1969, registrant has failed to make and keep current books and other records relating to its business as a broker and dealer in contravention of Section 17(a) of the Exchange Act [15 U.S.C. 78q(a)] and Rule 17a-3 [17 CFR 240.17a-3], in that it has not maintained a position record for all securities long and short and their locations except for the period since November 17, 1970; it has not maintained ledger accounts for customers itemizing purchases, sales, receipts and deliveries of securities, all receipts and disbursements of cash and all other debits and credits; its inventory of securities has been inaccurate; its income account has failed to reflect all income received; its net capital computations have been incorrect; and it has not had personnel questionnaires for certain associated persons.

6. That since about May 1, 1969, registrant has made use of the mails and means and instruments of interstate commerce to effect transactions in, and to induce the purchase and sale of, securities (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of manipulative, deceptive and other fraudulent devices and contrivances, practices and courses of business as specified in paragraphs numbered 7 and 8 hereof, in contravention of Section 15 (c)(1) of the Exchange Act [15 U.S.C. 78o(c)(1)] and Rules 15c1-4 [17 CFR 240.15c1-4] and 15c1-6 [17 CFR 240.15c1-6].

7. That since about May 1, 1969, registrant has effected with and for the accounts of customers, transactions in, and has induced the purchase and sale by customers of, securities (other than U. S. Tax Savings Notes, U. S. Defense Savings Stamps or U. S. Defense Savings Bonds, Series E, F and G) without at or before the completion of each such transaction giving or sending to such customers written notification disclosing, in cases where registrant was acting as a broker for such customers or as a broker for both such customers and some other person, either the name of the person from whom the security was purchased

or to whom it was sold for such customers and the date and time when such transaction took place or the fact that such information would be furnished upon the request of such customers, and the source and amount of any commission or other remuneration received or to be received by registrant in connection with the transaction as prescribed in Rule 15c1-4 [17 CFR 240.15c1-4].

8. That since about May 1, 1969, registrant, as a broker acting for customers and for customers and other persons, has engaged in acts designed to effect with or for the accounts of such customers, transactions in, and purchases and sales by such customers of, securities in the primary or secondary distributions of which registrant was participating and was financially interested without, at or before the completion of each such transaction, giving or sending to such customers written notification of the existence of such participation or interest as prescribed in Rule 15c1-6 [17 CFR 15c1-6].

9. That since about May 1, 1969, registrant, as a broker and dealer not a member of a national securities association, has effected securities transactions in contravention of Section 15(b)(10) of the Exchange Act [15 U.S.C. 78o (b)(10)] and Rule 15b10-5 [17 CFR 240.15b10-5], in that registrant has exercised discretionary power or authority for customers without such customers having given their prior written authorizations to exercise such power or authority to a stated associated person or persons, and having indicated their reasons for giving such authorizations.

10. That since about May 1, 1966, registrant has been a broker and dealer engaged in the business of effecting

securities transactions for the accounts of others and for its own account, has been making use of the mails and of means and instrumentalities of interstate commerce to effect transactions in, and to induce the purchase and sale of, securities (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of manipulative, deceptive and other fraudulent devices and contrivances, including the acts, practices and courses of business specified in paragraphs numbered 6 through 14 hereof, in contravention of Section 15(c)(1) of the Exchange Act [15 U.S.C. 78o(c)(1)] and Rule 15c1-2 [17 CFR 240.15c1-2].

11. That since about May 1, 1966, defendants have been soliciting churches and other religious institutions to employ registrant as underwriter for the sale of their bonds under a program in which registrant guarantees the sale of such bonds on the representation that registrant is able to make such a firm commitment for the purchase and sale of such securities, is able to meet all obligations and liabilities arising in connection therewith and in operating within the jurisdiction of the federal and state authorities charged with regulating the securities industry, while and at times when registrant was unable to meet the net capital requirements of Section 15(c)(3) of the Exchange Act [15 U.S.C. 78o(c)(3)] and Rule 15c3-1 [17 CFR 240.15c3-1], registrant's report on Form 17A-5 as of March 31, 1970, as filed with the Commission, inaccurately reflected registrant's assets and liabilities and inaccurately indicated that registrant had sufficient net capital to meet the requirements of said Rule, and registrant omitted to disclose to such churches and other religious institutions its financial condition and its inability

to meet the financial responsibility requirements of said Rule and its failure to comply with applicable federal laws and regulations relating to the securities industry as found in paragraphs numbered 4 through 16 hereof.

12. That since about May 1, 1966, defendants have been inducing churches and other religious institutions (hereinafter sometimes referred to as "borrowers") to execute underwriting agreements in which registrant is designated underwriter of their bonds and custodian of funds received from sales thereof and which contain a provision that registrant may invest such funds in religious institutional bonds for such borrowers, as necessary liquidate such investments, make disbursements and deliver funds for payment of such borrowers' obligations incurred in their construction and other programs, and return to such borrowers 5% simple interest earned on such funds. On the basis of this authority defendants have been exercising discretionary authority over funds received from sales of bonds issued by such borrowers and over such borrowers' accounts with registrant, effecting transactions therewith and therein, including sales to such borrowers of bonds issued by other churches and religious institutions having extended maturities without sending to such borrowers confirmations advising them of the securities sold to them and placed in their accounts, the date and amount of each such transaction and the source and amount of commission and other remuneration received or to be received by defendants in connection with each such transaction. Registrant has been crediting to the accounts of such borrowers 5% simple interest on the amounts invested for such borrowers in the bonds of other churches and religious institutions even though the interest rates on the bonds placed in such borrowers' accounts have been substantially higher and defendants have retained and treated as income to registrant the interest differential between the 5% rate paid to such borrowers and the substantially higher yields on the bonds placed in their accounts, thus obtaining secret profits from such borrowers while acting in the capacity of their agent, custodian and fiduciary. Registrant has been, in some instances, investing funds held as custodian for a particular religious institution in such institution's own bonds with the result that such institution has been paying interest on such bonds at a rate in excess of 5% per annum while receiving a credit to its account with registrant of only 5% per annum, registrant retaining the interest differential as a secret profit.

13. That since about May 1, 1966, registrant, as a broker and dealer, has been soliciting churches and other religious institutions to employ it as underwriter of their bonds and has solicited investors to purchase such bonds on the representations that the sale of all bonds so underwritten by registrant is guaranteed by it and that registrant will purchase or sell any such bonds remaining after the church has put forth its best effort, without disclosing that registrant has been placing a substantial portion of such bonds in the accounts of other churches and religious institutional issuers for which it has been acting as underwriter and for which it has been holding funds as custodian by recording buy and sell transactions in securities on registrant's books among various of such churches and other religious institutional issuers; that availability of funds for a particular such issuer's construction or other program could be dependent upon registrant's ability to dispose of the

securities in which such funds were thus invested; that there is no independent market for such securities; and that such issuers whose funds are invested by registrant in securities of other churches and religious institutions may suffer the loss resulting from any default on the part of an issuer of a security in which their funds are invested.

14. That since about May 1, 1966, registrant, as a broker and dealer, has been offering to sell and selling religious institutional bonds through the use of prospectuses prepared by registrant which are materially false and misleading in that such prospectuses contained the representation that the proceeds from the sale of the religious institutional bonds described in such prospectus would be disbursed by registrant in accordance with the purposes of the bond issue as set out in such prospectus—*i.e.,* for such expenditures as consolidation and retirement of existing indebtedness, purchase of land for new buildings and construction, expansion and remodeling of churches, sanctuaries, educational buildings and other facilities—without disclosing: that registrant in its discretion would invest portions of such proceeds in other religious institutional bonds having extended maturities of from one to more than eleven years; the amounts of such proceeds to be received by registrant and the other defendants as fees, commissions and other remunerations; and that registrant would use such proceeds in completing other underwritings in which it and the other defendants would receive substantial fees, commissions and other remuneration.

15. That since about May 1, 1966, registrant, as a broker and dealer, by use of means and instrumentalities of interstate commerce and of the mails, directly and indirectly, has been employing manipulative and deceptive devices

and contrivances in contravention of Section 10(b) of the Exchange Act [15 U.S.C. 78j(b)] and Rule 10b-5 [17 CFR 240.10b1-5], in that registrant has been:

(a) Engaging in acts, practices and courses of business which operate and would operate as a fraud and deceit upon customers of registrant as described more particularly in paragraphs 11 through 14 hereof;

(b) Making untrue statements of material facts, namely, the statements set forth in paragraphs 11 through 14 hereof; and

(c) Omitting to state the facts specified in paragraphs 11 through 14 hereof relating to registrant's financial condition, its lack of sufficient capital to meet the requirements of the federal laws and rules relating to financial responsibilities of securities brokers and dealers, its mode of operations, its secret profits from transactions in discretionary accounts, and details of transactions in which funds and securities are transferred among accounts of customers on the books of registrant, which facts are material in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

16. That since about May 1, 1966, registrant, as a broker and dealer, in offers and sales of securities by use of means and instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly has been:

(a) Obtaining money and property by means of the untrue statements of material facts as set forth in paragraphs 11 through 14 hereof;

(b) Obaining money and property by means of the omissions to state material facts as set forth in paragraphs 11 through 14 hereof, which facts are necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; and

(c) Engaging in the transactions, practices and courses of business described in paragraphs 11 through 14 hereof, which operate and would operate as a fraud and deceit upon the purchasers of such securities.

17. That in a letter dated September 24, 1970, from the Atlanta Regional Office of the Securities and Exchange Commission, defendants were advised of the net capital requirements of Rule 15c3-1, the bookkeeping requirements of Rule 17a-3 and the confirmation requirement of Rule 15c1-4 and were further advised that according to an examination made of registrant's business, it was apparently violating these rules; but that subsequent to receipt of such letter, registrant continued to effect transactions without complying with the requirements of said rules.

12. That defendants Guaranty Bond Company, Inc. H. J. Huey and B. T. Huey aided and abetted registrant in the acts, practices and transactions set forth in paragraphs 4 through 17 hereof.

19. It was of interest to the Court that the defendants admitted all of the enumerated violations except they stated their disagreement with the method of computation of the 20 to 1 capital requirement rule but submitted no alternate method of computation even though they called as a witness a certified public accountant who claimed to have expertise in the field of compliance with the requirements of the law and those of the regulations of the Securities and Exchange Commission. The defendants admitted that by corporate resolutions the earnings of Guaranty Bond and Securities Corporation were diverted to its parent and sole stockholders, Guaranty Bond Co., Inc. They admitted taking secret profits as a fiduciary but had no plans to make any restitution.

The principal defenses of the defendants were that they were not vicious persons and that the security investigators for the Securities and Exchange Commission should have furnished more help to defendants in their attempt to comply with the law and regulations.

Furthermore, as late as January 2, 1971, the defendants withdrew from circulation certain advertising matter. At the same time it solicited from its customers a discretionary account authorization. The defendants did not advise its customers as a part of said solicitation that this injunction suit was pending nor that its illegal representations previously made to them were not effective.

The defendants contend that they are entitled to another chance. However, they admit that they cannot comply with the capital requirements.

In addition, the defendants have as of January 2, 1971 prepared a confirmation form to be sent to their customers confirming a sale. This form will not show, and the defendants so admit, the dollar amount of the commission charged by the defendants. Their excuse is that it is too difficult to compute the amount of commission. Furthermore, they contend that the confirmation form is coded so as to refer to 33 separate formulas printed in numerical order on the reverse side of the confirmation form. The defendants do not attempt to explain how a layman can determine, from the applicable formula, the amount to the commission when it is difficult for the defendants to compute same.

It is obvious that the defendants cannot and will not comply with the applicable laws and regulations. Furthermore, defendants will, unless restrained and enjoined, continue to engage in the acts and practices described hereinbefore.

Conclusions of Law

1. That the acts and practices set forth in the preceding Findings of Fact constitute violations of Sections 10(b), 15(b)(10), 15(c)(1), 15(c)(3) and 17(a) of the Securities Exchange Act of 1934 [15 U.S.C. 78j(b), 78o(b)(10), 78o(c)(1), 78o(c)(3) and 78q(a)], Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933 [15 U.S.C. 77q(a)(2) and 77q(a)(3)] and Rules 10b-5, 15b10-5, 15c1-2, 15c1-4, 15c1-6, 15c3-1 and 17a-3 [17 CFR 240.10b-5, 15b10-5, 15c1-2, 15c1-4, 15c1-6, 15c3-1 and 17a-3].

2. That plaintiff is entitled to a preliminary injunction against defendant Guaranty Bond and Securities Corporation, its officers, agents, servants, employees and attorneys, and each of them, restraining and enjoining them from further violations of Sections 10(b), 15(b)(10), 15(c)(1), 15(c)(3) and 17(a) of the Securities Exchange Act of 1934 [15 U.S.C. 78j(b), 78o(b)(10), 78o(c)(1), 78o(c)(3) and 78q(a)], Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933 [15 U.S.C. 77q(a)(2) and 77q(a)(3)] and Rules 10b-5, 15b10-5, 15c1-2, 15c1-4, 15c1-6, 15c3-1 and 17a-3 [17 CFR 240.10b-5, 15b10-5, 15c1-2, 15c1-4, 15c1-6, 15c3-1 and 17a-3], and against defendants Henry Jeremiah Huey, Jr., Brooks Thomas Huey and Guaranty Bond Co., Inc., their officers, agents, servants, employees and attorneys, and each of them, restraining and enjoining them from aiding and abetting defendant Guaranty Bond and Securities Corporation in any further violations of said sections and rules.

/s/ L. Clure Morton
United States District Judge

EXHIBIT E

In the U. S. District Court for the
Middle District of Tennessee
Nashville Division

Securities and Exchange Commission
vs.
Guaranty Bond and Securities Corporation; Henry Jeremiah Huey, Jr.; Brooks Thomas Huey; and Guaranty Bond Co., Inc., 2312 West End Avenue, Nashville, Tennessee 37203

No. 5989

Agreed Order

(Entered January 29, 1971)

This cause came on to be heard on January 27, 1971, upon defendants' motion to amend the preliminary injunction entered herein on January 6, 1971, and plaintiffs' applications for appointment of a Receiver for Guaranty Bond and Securities Corporation and Guaranty Bond Co., Inc.; and upon consideration of said motion and applications, the record made in this cause, and arguments of counsel; and the Court being fully advised in the premises:

1. It is ordered, adjudged and decreed that defendants' motion be and it hereby is denied.

2. It appearing to the Court that Receivership is the only remedy that will adequately protect the interests of churches and other religious institutions for which Guaranty Bond and Securities Corporation has been acting as underwriter and the interests of other customers and creditors of the aforesaid corporations, and the said corporations concurring in the request for and agreeing to the appointment of a Receiver, it is ordered, adjudged and decreed that James C. Barbour of Nashville, Tennessee is appointed Receiver of said corporations subject to the submission of a good and sufficient bond in the amount of One Hundred Thousand Dollars ($100,000.00), conditioned upon the faithful performance of his duties as said Receiver, having taken the oath required by law, and being otherwise qualified.

3. It is further ordered, adjudged and decreed that the said Receiver shall take immediate custody, control and possession of all funds, property, premises and other assets of or in the possession or under the control of said corporations, wherever constituted, with full power to collect, receive, and take into possession all goods, chattels, rights, credits, monies, effects, securities, lands, books and records of account, and other papers and documents of said corporations; to preserve and protect all such assets, pending further order of this Court, in order to prevent the irreparable loss, damage and injury to customers and other creditors, to conserve and prevent withdrawal and misapplication of funds and other properties entrusted to said corporations; and upon the Court's approval, to determine, adjust and protect the equities of creditors, customers and investors whose funds and other properties have been entrusted to or invested with said corporations.

4. It is further ordered, adjudged and decreed that the Receiver shall not surrender, sell, or otherwise dispose of any of the assets within his care, custody, and control or properties entrusted to him, including but not limited to the right to sell securities for cash to meet construction requirements, except upon notice to all parties of record and the opportunity to be heard thereon, unless such immediate disposition be required in order to prevent irreparable damage, and then only upon prior approval of the Court.

5. It is further ordered, adjudged and decreed that the corporations, their officers, agents, managers and employees be and they hereby are commanded and required to deliver over to said Receiver possession and custody of all funds, securities, property, premises and other assets, and all books and records of accounts, title, documents and other papers of said corporations, and that its officers, agents, managers and employees be and they hereby are enjoined and restrained from interfering with said Receiver taking such custody, control and possession, and from interfering in any manner, directly or indirectly, with such custody, possession and control by said Receiver.

6. It is further Ordered, Adjudged and Decreed that General Insurance Underwriters, a division of Guaranty Bond Co., Inc., be and the same hereby is enjoined from making any disbursements except for weekly payroll checks to those employees of General Insurance Underwriters who are now employees of said insurance business, except that no such payments are to be made to the defendants, Henry Jeremiah Huey, Jr. and Brooks Thomas Huey.

7. It is further Ordered, Adjudged and Decreed by the Court that said Receiver shall have full power and authority until further order of this Court:

(a) To employ, discharge and fix the compensation of such employees as he may deem necessary and advisable for the preservation and protection of the within estate;

(b) To acquire for cash or on credit such supplies, services or other property as he may deem necessary and advisable in connection with the preservation and protection of the said estate;

(c) To enter into any contracts incidential to the preservation and protection of the said estate;

(d) To collect and receive all monies or other properties due or to become due to the said estate, and to hold and retain the same, subject to further orders of Court.

(e) To do such things and to incur such expenses as may be necessary and advisable in the preservation and protection of the said estate.

(f) To institute and maintain legal action for the preservation and protection of said estate upon prior Court approval.

8. It is further ordered, adjudged, and decreed that upon prior approval of the Court, the Receiver is authorized to retain counsel for the purpose of representing him in this cause.

9. It is further ordered, adjudged and decreed that all parties, firms, corporations, partnerships and other persons are hereby enjoined and restrained from instituting or maintaining any action of any kind or character, includ-

ing but not limited to any action that might impose a lien on the assets of the corporations, against the said corporations and the said Receiver, until further order of Court; provided, however, that any action presently pending in state courts is hereby restrained for sixty (60) days, after which time judgement may be obtained if proper, but the enforcement of said judgment is enjoined and said judgment creditor is required to come in and file his claim in this Court.

10. It is further ordered, adjudged and decreed that the Receiver, after making an investigation of the affairs of the said estate shall submit a recommendation to this Court for appropriate steps to be taken to protect the diversified interests of religious institutions for which said corporations have been acting as underwriter, and the interests of creditors and other persons dealing with the said corporations.

11. It is further ordered, adjudged and decreed that the defendants, Henry Jeremiah Huey, Jr. and Brooks Thomas Huey, without objection by them, be and they are hereby enjoined from disposing of any of their assets without obtaining the Court's prior approval except for reasonable living expense.

12. It is further ordered, adjudged and decreed that the Receiver make publication in a newspaper of general circulation in Davidson County, Tennessee, notifying all the creditors of said corporations of this Receivership, and requiring them to file and prove their respective claims against the corporations on or before September 1, 1971, or they may be excluded from the benefits of this proceeding.

13. It is further ordered, adjudged and decreed that the Court reserves the right to make and enter such further orders or decrees, upon application of said Receiver or otherwise, that may be necessary for the guidance of said Receiver in his administration of the Receivership herein established.

Entered this the 27th day of January, 1971.

/s/ L. Clure Morton
United States District Judge

Approved for Entry

J. Cecil Penland
Jennie H. Randolph
Attorneys for Securities and
Exchange Commission

Boult, Cummings, Conners & Berry
By Ed R. Davies

By Robert P. (Illegible)
Attorneys for Intervenors

Frank S. King
Attorney for the Defendants

EXHIBIT F

In the United States District Court for the
Middle District of Tennessee

Nashville Division

Securities & Exchange Commission, *vs.* Guaranty Bond and Securities Corporation, et al.	Civil Action No. 5989

Memorandum

(Entered February 9, 1971)

This cause came on to be heard upon the petition of the Securities & Exchange Commission for the appointment of a receiver for the corporations Guaranty Bond and Securities Corporation and Guaranty Bond Co., Inc. The defendants made an oral application for permission to proceed under Chapter X of the Bankruptcy Act. However, they admitted that (1) no new capital could be obtained; (2) their bank accounts had been applied to outstanding debts due their bank; (3) they had no funds to pay their obligations, current or otherwise; and (4) there were no lawful methods to obtain other funds.

On denial of their request for leave to proceed under Chapter X of the Bankruptcy Act, and the denial of their motion of January 13, 1971, the corporate defendants orally joined in the petition of the plaintiffs for the appointment of the receiver to take possession of the assets of the defendant corporations and to wind up their affairs. These defendants asserted to the Court that any delay in such appointment and administration would severely prejudice the defendants and their creditors.

The intervenors requested that the individual defendants, Huey, be enjoined from disposing of any of their personal assets pending the outcome of this litigation. These defendants, through their attorney, orally agreed for such injunction to issue.

The testimony of the witnesses and the records of the defendant corporations filed in this case clearly reflect that the defendant corporations cannot pay their obligations as they mature, cannot pay their current obligations and that their liabilities far exceed their realizable assets and this Court so holds.

A receiver will be appointed and, absent any bankruptcy proceedings, he will conserve, administer and liquidate the affairs and assets of the defendant corporations. An injunction will issue restraining the individual defendants, Huey, from disposing of their personal assets. All creditors and parties having claims will be permitted, without further order, to intervene.

An appropriate order will be prepared and entered.

This the 27th day of January, 1971.

/s/ L. Clure Morton
United States District Judge

Response of the Securities and Exchange Commission

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[CAPTION OMITTED]

(Filed: May 17, 1972)

The Securities and Exchange Commission files this Response to Receiver's Petition No. 22:

1. The Commission admits the allegations of Paragraph 1 of the Petition, in that the Atlanta Regional Office wrote a letter dated February 4, 1971, to the Receiver, advising him of the possible applicability of the Securities Investor Protection Act ("SIPA").

2. The Commission admits the allegations of Paragraph 2 of the Petition, in that the Atlanta Regional Office sent information on February 2, 1971, to the Commission's headquarters in Washington, D. C., on the circumstances of Guaranty Bond and Securities Corporation, except that it denies that the Atlanta Regional Office purported to send "required notice" to Washington, D. C., under SIPA, and except that the Atlanta Regional Office did not state on May 5, 1971, that the information might have been delayed in reaching the Securities Investor Protection Corporation ("SIPC") but mentioned the possibility to the Receiver at a later date, perhaps as late as October 1971.

3. The Commission admits the allegations of Paragraphs 3 and 4 of the Petition, except that it is without

knowledge or information sufficient to form any belief as to the nature and extent of the information supplied to SIPC, as alleged in the first sentence of Paragraph 4 of the Petition.

4. The Commission admits the allegations of Paragraphs 5 through 7 of the Petition.

5. The Commission admits the allegations of the first five lines of Paragraph 8 of the Petition. The Commission denies the last three lines of the Paragraph, in that a letter dated February 10, 1972, from David Ferber, Solicitor of the Commission, was sent to Receiver's counsel, enclosing a copy of a letter dated July 1, 1971 from Sheldon Rappaport, Associate Director of the Division of Trading and Markets, to Mr. Woodside, Chairman of SIPC, together with a memorandum attached to the letter, describing the circumstances of Guaranty Bond and Securities Corporation. Copies of this correspondence are attached hereto as Exhibit A. The letter dated July 1, 1971 did not purport to be the statutory notice required by Section 5(a)(1) of SIPA and was sent at SIPC's request following an inquiry which Receiver's counsel made to SIPC.

6. The Commission, as to the allegations contained in Paragraph 9 of the Petition, admits that Guaranty Bond and Securities Corporation was a registered broker-dealer when SIPA took effect on December 30, 1970, and appears to have continued to be engaged in the securities business until at least January 5, 1971.

As to the allegations that SIPA coverage should be extended to customers of Guaranty Bond and Securities Corporation, the Commission is of the view that SIPA coverage should not be withheld merely because the Commission filed this action prior to the effective date of SIPA, or because the firm was in net capital violation in 1970, since it appears that the firm continued to engage in the securities business until at least January 5, 1971. Action by SIPC is necessary, however, only if it appears that the firm will otherwise fail to meet its obligations to customers. There has been no demonstration that the customers of Guaranty Bond and Securities Corporation will in fact sustain any losses. In this connection, from information obtained from SIPC, it appears that the Receiver, as Receiver of Guaranty Bond and Securities Corporation, may have causes of action for damages or restitution against either the parent, Guaranty Bond Co., Inc., or against individual principals of the parent, which could redound to the benefit of the customers of Guaranty Bond and Securities Corporation.

7. The Commission admits as to the allegations of Paragraphs 10 through 12 of the Petition that it has a duty under Section 5(a)(1) of SIPA to notify SIPC that a member of SIPC is in or approaching financial difficulty. The Commission, however, is of the view that it is irrelevant to whether SIPA coverage is applicable whether the Commission formally advised SIPC under Section 5(a)(1) of the Act. The Commission is of the view that notification is not a condition precedent to coverage under SIPA and does not constitute either authorization to or compulsion on SIPC to bring action.

8. The Commission is without knowledge or information sufficient to form a belief as to the allegations of Paragraph 13 of the Petition.

9. Paragraph 14 of the Petition states a legal conclusion, as to which the Commission takes no position at this time.

Respectifully submitted

David Ferber
Solicitor

Robert E. Kushner
Assistant General Counsel

Michael A. Macchiaroli
Attorney
Securities and Exchange Commission
500 North Capital Street
Washington, D.C. 20549
(202) 755-1170

J. Cecil Penland
Assistant Regional Administrator
Securities Exchange Commission
Atlanta Regional Office
Suite 138
1371 Peachtree Street, N.E.
Atlanta, Georgia 30309

May 15, 1972

EXHIBIT A

February 10, 1972

W. Ovid Collins, Jr. Esq.
Cornelius, Collins, Higgins & White, Esqs.
18th Floor, Third National Bank Building
Nashville, Tennessee 37219
Re: Guaranty Bond & Securities Corporation

Dear Mr. Collins:

This is in reply to your letter of January 31, 1972.

I am enclosing a copy of a letter dated July 1, 1971, from Sheldon Rappaport to Mr. Woodside, chairman of SIPC, together with the memorandum attached to the letter. The letter and memorandum constitute the only reference to the condition of Guaranty Bond & Securities Corporation made by the Commission to SIPC. As you will note from the letter, it was sent at SIPC's request following an inquiry which you made to SIPC.

You ask our advice as to the proper venue of a proceeding to raise the issues regarding SIPC. I am sorry, but we have not researched this question.

In considering the merits of the issues you raise, we would appreciate your advice as to whether Guaranty Bond and Securities Corporation did business with customers subsequent to December 30, 1970. If so, could you furnish us a schedule showing the customers' names and addresses, the securities purchased or sold, the dollar amounts of the purchases or sales, and the present indebtedness owed to such customers?

Thank you very much.

Your truly

David Ferber, Solicitor
Office of General Counsel

July 1, 1971

Mr. Byron D. Woodside, Chairman
Securities Investor Protection
Corporation
Suite 104
955 North L'Enfant Plaza
Washington, D.C. 20004

Dear Mr. Woodside:

Enclosed is the data you requested concerning Guaranty Bond and Securities Corp. ("Registrant"), a registered broker-dealer and member of SECO. Pursuant to Commission authorization the Atlanta Regional Office, on January 6, 1971, obtained an order in the United States District Court for the Middle District of Tennessee enjoining the Registrant from violations of applicable financial responsibility and bookkeeping requirements. On January 29, 1971 a receiver was appointed by the court. The Commission has authorized me to notify you of these facts.

We are advised that you are already in contact with the receiver. If we can be of further help in this matter please let us know.

Sincerely

Sheldon Rappaport
Associate Director

Enclosure

MEMORANDUM

Re Guaranty Bond & Securities Corp. (8-10785)

This is a case in which a church bond dealer was operating in violation of the net capital, bookkeeping, confirmation and other rules. As an underwriter of religious institutional bonds, it acted in a fiduciary capacity for churches as custodian of funds raised and made investments for them on a discretionary basis in other securities being underwritten by Registrant without making required disclosures of its adverse interests and its secret profits. It did not disclose to churches what securities were placed in their accounts under its discretionary authority. It entered into firm commitments for underwritings of large amounts of church bonds at a time when it had insufficient capital to meet the requirements of the net capital rule. Guaranty Bond and Securities Corp. ("Registrant") has been registered with the Commission as a broker-dealer since June 20, 1962. It is a SECO broker-dealer, not being a member of a national securities association registered with the Commission.

Registrant was primarily engaged in underwriting such bonds through a program, referred to as Plan III, "which guarantees churches the complete sale of all bonds." Generally, under this plan, Registrant first supervises a 30 day solicitation of the church membership. Upon completion of the initial drive among members of the church, a report was submitted to Registrant together with all the proceeds of the bonds to be issued and the unsold portion of the bonds. Registrant, in its underwriting contract, agreed to sell the remaining bonds and to deliver funds to the church for the institution's obligations incurred in its construction or other programs. In the meantime, Registrant acted as custodian of all funds raised through sale of bonds, both those sold by the church and through Registrant's separate efforts. Registrant's usual form of underwriting contract contained a clause to the effect that "the underwriter as custodian will invest such funds in religious institutional bonds for the borrower (church) and, as necessary, liquidate investments, make disbursements, and deliver funds in accordance with" the agreement to pay the churchs' obligations under their construction programs, etc. On the basis of this general authority, Registrant exercised complete discretionary authority over all funds received from sales of such bonds and over the churchs' accounts, effecting transactions therein at will including purchases and sales of bonds between the various religious institutions' accounts for whom it acted as underwriter.

The church customers usually were credited with only 5% interest on the funds invested by Registrant in bonds for their accounts even though many of such bonds yield 6% to 7¼%, or more, and Registrant retained the interest differential as income to itself without advising the customer-church of the amount thereof.

Registrant received a basic service charge and commissions on transactions which were transferred immediately to Registrant's parent, Guaranty Bond Company, Inc., through a transfer account without such fees being taken into the income account of Registrant. Parent is owned principally by a partnership made up of H. J. Huey, T. B. Huey and the estate of their deceased brother E. E. Huey. At times Registrant placed bonds in the account of its parent and resold church bonds for its parent.

Registrant was licensed in 16 states, employed over 50 people and had a large volume of business including 80 underwritings of bonds having a face value of over $15,000,000 for the year ended in May 1970.

A financial inspection of Registrant as of September 30, 1970 disclosed Registrant's financial position to be as follows:

Aggregate Indebtedness	$ 782,531.54
Required Minimum Net Capital Under Rule 15c3-1(a)(1)	39,126.58
Net Capital Before Deduction on Proprietary Securities (Deficit)	(—359,531.72)
Deduction of Unrealized Loss on Open Contractual Commitments	3,127,700.00
Net Capital (Deficit)	(—3,481,231.72)
Net Capital Required	39,126.58
Additional Capital Required	3,526,350.30
Excess of Total Assets Over Total Liabilities	116,857.35

The amount of open contractual commitments, $3,127,700.00 included in these calculations represent 100% of the amounts of securities having no market value taken by Registrant as underwriter on consignment in which it "agrees to underwrite the purchase and/or placement" of all bonds of the particular issue, which remained unsold and unplaced. It does not include any amount for the additional obligation Registrant has to eventually resell bonds it has placed in church accounts so as to provide them with funds as needed to meet their construction projects. As of September 30, 1970, bonds with a face amount of $8,948,200 had been placed in and were being held by Registrant for the accounts of such issuer-customers.

On September 24, 1970, a letter from the Atlanta Regional Office sent to Registrant and each of its officers and directors advised them of the net capital and bookkeeping requirements of Rules 15c3-1 and 17a-3 as well as various other rules and of the firm's failure to comply with such requirements as indicated by an inspection of its records. A written response to the Atlanta Regional Office's letter of September 24 was requested. A telegram, dated October 1, 1970, was later received from Registrant stating that the firm had employed a national accounting firm to upgrade its accounting system and in the interim the deficiencies called to its attention were being corrected. Even though the letter of September 24 advising the Registrant that any further business might be deemed willful violations, Registrant effected numerous transactions.

On the basis of these facts the Commission obtained an injunction and a receiver.

District Court Opinion

In the
UNITED STATES DISTRICT COURT
For the Middle District of Tennessee
Nashville Division

Civil Action No. 5989

Securities and Exchange Commission
vs.
Guaranty Bond and Securities Corporation, et al.

Memorandum—No. 54

On December 22, 1970, the Securities and Exchange Commission (hereinafter the "Commission") filed a complaint and moved for a preliminary injunction against Guaranty Bond and Securities Corporation (hereinafter "Guaranty") on the basis of alleged violations of the Securities Exchange Act of 1934 and of the Securities Exchange Act of 1933. On January 6, 1971, the injunction was granted, and this court found, among other things, that Guaranty had violated the Commission's net capital rule by doing business (1) while its net capital was less than $5,000, and (2) while its aggregate indebtedness exceeded 2,000 per centum of it net capital, see § 15(c)(3) of the Exchange Act, 15 U.S.C. § 78o(c)(3) and Rule 15c3-1, 17 C.F.R. 240.15c3-1, and that the net capital violation had existed for a substantial period of time prior to the filing of the complaint by the Commission. In the period from December 22, 1970, to January 6, 1971, Guaranty continued to do business, and prior to January 6, handled 101 transactions during 1971. Then, pursuant to

the Commission's motion, a receiver was appointed by agreed order entered on January 29, 1971.

On May 27, 1971, the receiver made demand upon the Securities Investor Protection Corporation (hereinafter "SIPC") for protection of Guaranty's customers under the Securities Investor Protection Act of 1970, 15 U.S.C. § 78aaa, *et seq.* (hereinafter the "Act"), but SIPC refused. The Commission had not given SIPC a formal notice as provided by § 5(a)(1) of the Act that Guaranty was approaching financial difficulty, and had taken no other action to see that SIPC intervened. On April 6, 1972, pursuant to the receiver's petition, an order was entered requiring the Commission and SIPC to show cause why the remedies afforded by the Act should not be made available in this situation. Guaranty has been registered with the Commission as a broker-dealer under § 15 of the Securities Exchange Act, 15 U.S.C. § 78o, since June 20, 1962, and was therefore a member of SIPC on December 30, 1970, the date the Act became effective. See § 3(a) of the Act, 15 U.S.C. § 78ccc(a). The case is now before the court upon SIPC's response, which asserts three principal reasons why the relief requested should be denied: (1) lack of personal jurisdiction over SIPC; (2) lack of subject matter jurisdiction; and (3) exclusion of Guaranty by the terms of the Act.

Personal Jurisdiction

SIPC alleges that it is a non-resident foreign corporation created by Congress and that effective service of process can only be achieved in accordance with Rule 4(d)(7), 4(e) and 4(f) of the Federal Rules of Civil Procedure, which in turn would require application of Tennessee law governing service of process on foreign corporations. SIPC asserts that since it is not doing business in Tennessee, it is not subject to service of process issued in Tennessee.

This contention must be rejected. The Act plainly provides that SIPC will impose assessments on its members, collect these assessments through its collection agent, and extend protection to customers of its members. Since many members of SIPC are located within the state of Tennessee, it necessarily follows that the execution of these statutory activities anticipates a continuing relationship between SIPC and its members and customers, and the doing of these acts within the state of Tennessee necessary to achieve the purposes for which the Act was conceived. The nature of this relationship and the protection which SIPC affords Tennessee investors is sufficient in this court's opinion to warrant the exercise of in personam jurisdiction consistent with due process, and to be " . . . such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe* v. *State of Washington*, 326 U.S. 310, 316 (1945). *See also*, *McGhee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957).

The court finds this holding to be consistent with the Tennessee long-arm statute, T.C.A. § 20-235, *et seq.*, which has been construed by the Tennessee courts as conferring " . . . jurisdiction over non-resident defendants to the extent permitted by the due process clause," *Darby* v. *Superior Supply Co.*, 224 Tenn. 540, 458 S.W.2d 423, 426 (1970), and in accord with this circuit's interpretation of that statute's permissible breadth under the due process clause of the Fourteenth Amendment. *See King* v. *Hailey Chevrolet*, 462 F.2d 63 (6th Cir. 1972); *Southern Machine Company* v. *Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968). Certainly it can be said that ". . . Tennessee has an interest in resolving the conflict at issue. . . ." *Southern Machine Company* v. *Mohasco Industries, Inc.*, *supra*, at 384.

Subject Matter Jurisdiction

SIPC asserts that although by § 3 of the Act it is made subject to and granted all the powers conferred upon a nonpublic corporation by the District of Columbia Non-Profit Corporation Act, and is granted additional powers under subsection (b) to sue and be sued in any court, state or federal, there is a clear congressional mandate that enforcement actions against SIPC must be brought where its principal office is located. This assertion is based upon the fact that § 7(b) provides that in the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member, the Commission may apply to the district court of the United States in which the principal office of SIPC is located for an order requiring SIPC to discharge its obligation under the Act, and that had the Commission elected to seek enforcement in this case, the action would have to have been brought in Washington, D. C., the location of the principal and only office of SIPC.

For this reason, SIPC asserts that the court lacks subject matter jurisdiction to adjudicate the relief sought. The court finds this contention without merit, for the effect of such a proposition would not only be to substantially frustrate a principal goal of the Act—protection of public investors, but would also render meaningless the language of § 3(b)(1) which confers upon SIPC the right to sue and be sued in any court, state or federal. Had the instant proceeding been instituted in this court by the Commission rather than the receiver, then under § 7(b) of the Act dismissal of the action for improper venue if not lack of subject matter jurisdiction might logically be required. However, the fact that the receiver's enforcement action here is of the same type which, under § 7(b), the Commission may institute in the district court coterminous with the locale of SIPC's principal office does not compel the conclusion that the receiver must do likewise, nor that district courts other than those of the District of Columbia lack subject matter jurisdiction over claims arising under the Act. If substance and meaning are to be given to the Act and to the legislative goal of investor protection, then the default or neglect of the Commission to institute enforcement proceedings under § 7(b) should give rise to a similar cause of action by a receiver in behalf of a member's customers. When such an occasion arises, § 7(b) must be read in *pari materia* with § 3(b)(1) so as to provide a forum of practical utility to the parties involved and which can give meaningful effect to the Act as a whole in the protection of SIPC's members and their customers located throughout the country.

Since the jurisdictional interpretation sought by SIPC would, in severely limiting access to the courts, run counter to these considerations, the court finds that the provisions of § 7(b) do not limit this court's power to adjudicate an enforcement action brought by a receiver of an insolvent member of SIPC.

EXCLUSION OF GUARANTY UNDER THE ACT

SIPC contends that the application of the Act to this case would be to give it an unlawful retroactive effect. There is no dispute that the Act was intended to operate prospectively only. As stated by the court in *Lohf* v. *Casey,* 330 F. Supp. 356, 358 (D. Colo. 1971), *aff'd.* 446 F.2d 618 (10th Cir. 1972):

> ". . . it is equally clear that Congress expressed an intention of refusing to make the Act retroactive. The record is replete with comments to that effect, the most cogent example being the report of the Committee on Interstate and Foreign Commerce:

> > " 'It is the clear intention of your committee that SIPC assume no liability for firms either in net capital violation, in liquidation, or in bankruptcy at the time of creation of SIPC. H. R. Rep. No. 1613, 91st Cong., 2nd Sess. 4 (Oct. 21, 1970), reprinted in 3 U.S. Code Cong. & Admin. News '70 at 5268.'
>
> "This language is frequently echoed in the debates on this bill, and it seems clear that Congress did not intend the bill to operate retroactively."

As further evidence of the scope of coverage envisioned by Congress, Representative Moss, one of the proponents of the Act and a member of the Conference Committee stated:

> "This is not anticipated as bailing out those firms or their customers. This would be outside the scope of this bill. This bill does not cover retroactively." 116 Cong. Rec. 39,362 (1970).

Notwithstanding the prospective provisions of the Act, there remains the problem of whether the relief sought here would constitute a retroactive application. The Act provides that the rights of claimants are fixed as of the "filing date". In explanation of this term, § 5(b)(4)(B) provides:

> "(B) *Filing date.*—The term 'filing date' means the date on which an application with respect to any debtor is filed under subsection (a)(2); except that if—
>
> (i) a petition was filed before such date by or against the debtor under the Bankruptcy Act, or
>
> (ii) the debtor is the subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such debtor was appointed which proceeding was commenced before the date on which such application was filed,

> then the term 'filing date' means the date on which such petition was filed or such proceeding commenced."

In terms of the instant proceeding, a receiver was not appointed until January 29, 1971. SIPC contends, however, that this receivership was merely an ancillary action taken pursuant to the injunction proceeding which was commenced on December 22, 1970, eight days prior to the Act's effective date. Although § 5(b)(4)(B)(ii) is rather equivocal, the court is inclined to agree with SIPC that the injunction proceeding commenced on December 22, 1970, determined the filing date by reason of the receiver subsequently appointed. Furthermore, there is another persuasive factor present which compels the same conclusion. The injunction sought by the Commission was based in part upon the failure of Guaranty to meet the net capital requirements of Rule 15c3-1, 17 C.F.R. 240.15c3-1. As previously reflected by the legislative history, the Act was not intended to cover firms in such violation prior to December 30, 1970. This fact, coupled with the inescapable conclusion, drawn from evidence precipitated by the injunction proceeding, that Guaranty was hopelessly insolvent prior to December 30, 1970, persuades the court that to grant the requested relief would be a retroactive application of the Act and a clear frustration of legislative intent. Therefore, the court holds that customers of Guaranty are not entitled to protection under the Act, and it is hereby ORDERED that SIPC be dismissed as a party to this cause.

L. Clure Morton
L. Clure Morton
United States District Judge

Order No. 55

IN THE

UNITED STATES DISTRICT COURT
For the Middle District of Tennessee
Nashville Division

Civil Action No. 5989

Securities and Exchange Commission

vs.

Guaranty Bond and Securities Corporation, *et al.*

(Entered February 8, 1973)

The Memorandum filed in this cause on January 10, 1974, dismissing Securities Investor Protection Corporation (hereinafter "SIPC") as a party is amended as follows:

Said Memorandum constitutes the entry of a final judgment as to SIPC in view of the fact that the court specifically finds that there is no just reason for delay for the entry of a judgment as to this defendant. In view of the fact that the Memorandum is serving both as a memorandum and as an order, this amendment constitutes both a determination of the fact that there is no just reason for delay and an express direction for entry of the judgment as provided in Rule 54(b), Federal Rules of Civil Procedure.

/s/ L. CLURE MORTON
United States District Judge

Court of Appeals Opinion

No. 73-1451

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

Securities and Exchange Commission,
Appellee,
vs.
Guaranty Bond and Securities Corp., et al.,
Defendants,
James C. Barbour, Receiver,
Appellant.

Appeal from the United States District Court for the Middle District of Tennessee, Nashville Division.

Decided and Filed April 23, 1974.

Before: Phillips, Chief Judge Celebrezze and Miller, Circuit judges.

Miller, Circuit Judge. Guaranty Bond and Securities Corporation was registered with the S.E.C. as a broker and dealer in securities as required by Section 15(b) of the Securities Exchange Act of 1934. As part of its business, it promoted the sale of church bonds. On December 22, 1970, the S.E.C. filed in the court below a complaint against Guaranty alleging net capital violations contrary to the federal securities laws, including Section 15(c)(3) of the Securities Exchange Act, 15 U.S.C. 78*o*(c)(3). Injunctive relief was sought against the alleged violations.

The district court, finding that Guaranty had violated the S.E.C.'s net capital rule and that such violation had existed for a substantial period of time prior to the filing of the complaint by the S.E.C., granted a preliminary injunction. The court further found that between the filing of the complaint on December 22, 1970 and the granting of the injunction on January 6, 1971, Guaranty had continued to engage in substantial business, handling 101 transactions after the effective date of the Act creating the Security Investor Protection Corporation. On application of S.E.C., a receiver was appointed for Guaranty to take charge of all of its assets subject to the further orders of the court.

On March 31, 1972, the receiver filed a petition for an order directed to the S.E.C. and the Securities Investor Protection Corporation requiring each of them to show cause why S.I.P.C. should not be required to intervene in the action and afford to the customers of Guaranty the benefits of the Act. The show cause order was issued accordingly and both S.E.C. and S.I.P.C. responded. The court, without an evidentiary hearing, filed its memorandum opinion in which it found the Act (S.I.P.A.) was inapplicable to customers of Guaranty for the reason that Guaranty was insolvent and in financial difficulties before the effective date of S.I.P.A. To hold otherwise, it was said, would be to give the Act a forbidden retroactive effect. The court accordingly ordered that S.I.P.A. should be dismissed from the action. This order was certified as a final judgment for purposes of appeal.

The Security Investor Protection Act was enacted in response to the need to protect the customers of securities brokers and dealers which might fail, thereby jeopardizing the cash and securities that customers had left on deposit with the firm[1] S.I.P.A. accordingly created the Securities

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[1] The legislative history shows the purpose of the S.I.P.A.

The serious and persistent financial problems besetting the securities industry in recent months have led to the voluntary

Investor Protection Corporation as a "non-profit corporation," not designed to "be an agency or establishment of the United States Government," but rather to be "a membership corporation,"[2] consistent with the self-regulatory nature of the securities industry. 15 U.S.C. 78 ccc (a). The S.I.P.C.'s role is primarily one of consultation and cooperation with the self-regulatory organizations which remain subject to the federal securities laws and the rules of the S.E.C. By mandating membership in the S.I.P.C. for certain members of the securities industry and by granting the S.I.P.C. general assessment authority over the members in order to establish an S.I.P.C. fund, Congress accomplished its intention that the cost of providing protection to cus-

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> liquidations, mergers, receiverships or, less frequently, bankruptcies of a substantial number of brokerage houses. Such failures may lead to loss of customers' funds and securities with an inevitable weakening of confidence in the U. S. securities markets. Such lessened confidence has an effect on the entire economy. Whatever other steps must be taken to improve these conditions, one objective of the bill, as reported, is to provide investors protection against losses caused by the insolvency of their broker-dealer. The need is similar, in many respects to that which prompted the establishment of the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation.

4 U. S. Code Congressional and Administrative News 5255 (1970).

[2] The members of S.I.P.C., as defined by 15 U.S.C. Sec. 78 ccc (a) (2), are:

> (A) all persons registered as brokers or dealers under section 78o(b) of this title, and
>
> (B) all persons who are members of a national securities exchange,

other than persons whose business as a broker or dealer consists exclusively of (i) the distribution of shares of registered open end investment companies or unit investment trusts, (ii) the sale of variable annuities, (iii) the business of insurance, or (iv) the business of rendering investment advisory services to one or more registered investment companies or insurance company separate accounts;

tomers under S.I.P.C. was to be borne by the securities industry itself.[3]

Under 15 U.S.C. Sec. 78 eee (a)(1), if the S.E.C. or any self-regulatory organization believes that a broker or dealer subject to its regulations in, or approaching, financial difficulty, it must notify immediately the S.I.P.C. If the S.I.P.C. determines that a member broker or dealer has failed or is in danger of failing to meet its obligations to customers, it is authorized to seek a decree in an appropriate court adjudicating that the customers of a member of S.I.P.C. are in need of the protection of the Act. 15 U.S.C. Sec. 78 eee (a)(2). Upon so finding, the district court shall grant the decree and appoint a trustee for the liquidation of the business and an attorney for the trustee. The objectives of the proceeding, in addition to operating the business for a limited purpose, completing the open contractual commitments of the dealer, enforcing rights of subrogation and liquidating the business of the dealer, are "as promptly as possible" (1) to return specifically identifiable property to the customers of a firm, (2) to distribute the "single and separate fund," and (3) to pay to customers monies advanced by S.I.P.C. 15 U.S.C. 78 fff(a). To provide for prompt satisfaction of the net equities of the dealer's customers, S.I.P.C. must advance to the trustee such monies as may be required to satisfy the full claims of each customer not to exceed $50,000. 15 U.S.C. 78 fff(f).

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[3] S.I.P.C.'s first responsibility under the Act was to establish a fund which would consist of all amounts received by S.I.P.C. and from which all expenditures would be paid. 15 U.S.C. Sec. 78 ddd(c). If the fund should become insufficient for the purposes of the Act, the S.E.C. is authorized, if necessary for the protection of the customers of brokers and dealers and for the maintenance of confidence in the United States securities markets, to issue notes under certain conditions to the Secretary of the Treasury in an amount up to one billion dollars, which then may be lent to S.I.P.C. 15 U.S.C. 78 ddd (g).

If S.I.P.C. refuses to act, the S.E.C. is authorized by 15 U.S.C. 78 ggg(b),[4] to apply to the court for an order requiring the S.I.P.C. to discharge its obligations under the Act.

The present appeal involves a unique situation. The appellant, as mentioned earlier, urges, contrary to the district court's decision, that the Act is applicable to Guaranty Bond. The S.E.C. agrees with the appellant's contention that the Act is applicable, but challenges the court's decision that the receiver has standing to petition the court to apply the Act. The S.I.P.C. agrees with the district court as to the inapplicability of the Act but challenges, along with the S.E.C., the receiver-appellant's standing to obtain compliance with the Act.

The S.I.P.A. was effective on December 30, 1970. In two cases, *Lohf* v. *Casey,* 330 F.Supp. 356 (D. Colo. 1971), aff'd. 466 F.2d 618 (10th Cir. 1972) and *Bohart-McCaslin Ventures, Inc.* v. *Midwestern Securities Corp.,* 352 F.Supp. 937 (N.D. Texas 1973), courts have held that S.I.P.A. was not intended to apply to a broker-dealer who had failed prior to that date. The district court in *Lohf, supra* at 358 stated:

> ". . . it is equally clear that Congress expressed an intention of refusing to make the Act retroactive. The record is replete with comments to that effect, the most cogent example being the report of the Committee on Interstate and Foreign Commerce:

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[4] 15 U.S.C. 78 ggg (b) provides that:

> In the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member of SIPC, the Commission may apply to the district court of the United States in which the principal office of SIPC is located for an order requiring SIPC to discharge its obligations under this chapter and for such other relief as the court may deem appropriate to carry out the purposes of this chapter.

As mentioned above, this section is hardly couched in terms of exclusivity—a feat easily accomplished had it been the intent of Congress.

> 'It is the clear intention of your committee that SIPC assume no liability for firms either in net capital violation, in liquidation, or in bankruptcy at the time of creation of SIPC. H.R. Rep. No. 1613, 91st Cong., 2nd Sess. 14 (Oct. 21, 1970), reprinted in 3 U.S. Code Cong. & Admin. News '70 at 5268.'
>
> This language is frequently echoed in the debates on this bill, and it seems clear that Congress did not intend the bill to operate retroactively."

Congress seemed to be concerned that S.I.P.C. not be used to compensate customers of members firms of the New York Stock Exchange which "have closed their doors and begun liquidation," when the Exchange had not advanced money from its existing trust fund to protect the customers of those firms. As mentioned earlier in the *Lohf* quote, the Committee Report did use very broad language when it stated that coverage be withheld from firms "either in net capital violation, in liquidation, or in bankruptcy at the time of the creation of S.I.P.C." H.R. Rep. No. 91-1613, 91st Cong., 2d Sess. p. 14 (1970). The meaning of this broad language was subsequently clarified by Representative Moss, sponsor of the Bill, on the floor of the House, when he stated:

> "Finally, we have been concerned all along with the problem of providing protection to the customers of *firms that might fail before enactment of the bill into law.* We early anticipated this possibility but we have specifically declined to make the bill retroactive in its application. The bill is prospective from the date of its enactment." [emphasis supplied] 116 Cong. Rec. 39350-39351, 12-1-70.

Congress, lacking precise information on the condition of the industry, was concerned with the impact that S.I.P.C.

coverage might have on the Treasury. The losses that had already been experienced by the industry were regarded by Congress as the industry's responsibility. S. Rep. No. 1218, 91st Cong. 2d Sess. 6 (1970); H.R. Rep. No. 91-1613, 91st Cong., 2d Sess. 14 (1970).

Clearly to apply S.I.P.C. to a firm that was bankrupt prior to the Act would be to give the Act a retroactive application that runs counter to the Act's clear purpose as reflected by its legislative history. However, application of the Act to Guaranty would not be in our view a retroactive application. "A statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends are drawn from a time antecedent to its enactment." *Cox* v. *Hart,* 260 U.S. 427 (1922). The time period of the financial difficulties of the broker-dealer bears more on the status of the broker within the meaning of the Act than upon the issue of retroactivity.

The court in *Lohf* found the absence of business activity subsequent to the effective date of the Act as determinative of the non-coverage issue when it stated:

> However, it is apparent that plaintiff was not conducting its business as a broker or dealer at the effective date of the Act. The business was in the jurisdiction of the bankruptcy court, and the day to day decisions were being made by the trustee. We cannot consider plaintiff then to be a "broker or dealer," whether registered or not, as contemplated by the Act. It makes no difference for these purposes that plaintiff's registration had not been offically terminated, and thus the automatic membership in the Securities Investor Protection Corporation may have continued in form. It could not be expected that the Act could be applied to firms which had already gone out of business. Plaintiff thus did not have the status of a broker or dealer for the purposes of the Act. 466 F.2d at 620.

The district court in ***Bohart-McCaslin Ventures, Inc.,*** *supra* at 940 made a similar determination when it stated:

> For purposes of determining coverage under the Act, this Court discerns no legal difference between a firm in bankruptcy and a firm in the financial and legal condition which Midwestern suffered prior to the effective date of the Act. Midwestern, prior to the effective date of the Act, had ceased to be a broker-dealer in any real sense of that terms and has not resumed the normal activities of a broker-dealer even at the present time.

These determinations are not applicable to Guaranty since it actually conducted a substantial business after the effective date of the Act. In light of the purposes of the Act, the 101 transactions conducted by Guaranty after the effective date are sufficient, we believe, to qualify Guaranty's customers for the protection provided by the Act. As the Tenth Circuit stated in *Lohf* concerning the coverage of the Act:

> We must take this to mean firms or persons which were actually in business in the usual sense at the critical date were the "brokers or dealers" referred to. Congress was willing to extend coverage to then financially weak institutions and those of unknown strength, but the line was drawn to exclude those which had failed and were thus in fact not brokers or dealers. Supra at 621.

We hold that Guaranty, though financially weak, was, in fact, a broker or dealer at the effective date of the Act.

The court below focused on the filing date of the action against Guaranty by the S.E.C. which was prior to the effective date of the Act. However, the S.E.C. did not seek to force Guaranty into receivership until after the effective date Therefore, the filing of the original S.E.C. action did not prevent Guaranty from conducting normal business after the effective date of the Act and thus qualifying as a broker-dealer.

The S.I.P.C. and the S.E.C. challenge the receiver's standing to bring an action to compel either of them to act under the S.I.P.A. The court below held that the provisions of the Act "do not limit this court's power to adjudicate an enforcement action brought by a receiver of an insolvent member of S.I.P.C." We agree. The appellees point to an absence of express language providing for an enforcement action by the customers of a securities company or their representatives as prohibiting such an action. We are persuaded, however, that the lack of express language of exclusivity in providing for an enforcement action by the S.E.C., coupled with a general provision allowing for suits against the S.I.P.C.,[5] evidences an intent by Congress that the statute should not be as narrowly construed as the appellees urge.

The customers of Guaranty have a definite interest in the application of the S.I.P.A. to the present litigation. The receiver, the representative of the customers of Guaranty, seeks to have the S.I.P.C. meet its obligations to the customers under the broad purposes of the S.I.P.A. Apparently, the S.I.P.C. has not attempted to obtain an adjudication of the necessity for providing the protections of the S.I.P.A. to the customers of Guaranty. Nor has the S.E.C. moved to compel the S.I.P.C. to meet its obligations. We do not believe that Congress intended under such circumstances to leave the customers of securities firms without remedy under the S.I.P.A. Furthermore, despite the appellees urgings, we find no constitutional[6] or statutory prohibition[7] to the maintenance of an enforcement action by the receiver in this case.[8]

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[5] 15 U.S.C. 78 ccc (b) (1) provides that the S.I.P.C. has the power "to sue and be sued, complain and defend, in its corporate name, through its own counsel, in any court, State or Federal."

The judgment of the district court holding the S.I.P.A. inapplicable and dismissing the action as to S.I.P.C. must therefore be reversed for the reasons stated herein. Since we reject the premise on which the S.I.P.C. was dismissed as a party to the action—inapplicability of the S.I.P.A. to a company of Guaranty's status—the action is remanded to the district court for processing consistent with this opinion and specifically to determine and enforce any rights of Guaranty's customers under the S.I.P.A.

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[6] To meet the "case or controversy" requirement of the Constitution, the Supreme Court has formulated a standard for ascertaining those persons with "standing" for maintaining an action in a federal court. The standard as defined by the Supreme Court in *Sierra Club* v. *Morton*, 405 U.S. 727 (1971), is that one must have suffered "injury in fact" and the injury must be an "interest arguably within the zone of interests to be protected." The customers of Guaranty and their representative clearly meet this broad standard. *See also Data Processing Service* v. *Camp*, 397 U.S. 150.

[7] As mentioned earlier, there are no terms of exclusivity of enforcement in the statute.

[8] The S.I.P.C. also attacks the jurisdiction—both subject matter and in personam—of the district court to entertain this action. We find that the district court sufficiently disposed of these contentions in its memorandum opinion.

FILED
April 23, 1974
James A. Higgens, *Clerk*

Court of Appeals Judgment

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

No. 73-1451

Securities and Exchange Commission,
Plaintiff,

vs.

Guaranty Bond and Securities Corporation, Et. Al.,
Defendants,

James C. Barbour, Receiver,
Appellant.

Before: Phillips, Chief Judge, Celebrezze and Miller, Circuit Judges.

Judgment

Appeal from the United States District Court for the Middle District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Middle District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case is remanded for further proceedings.

It is further ordered that Appellant recover from Appellee, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered By Order of the Court

John P. Hehman
Clerk

A True Copy.

Attest:

John P. Hehman, Clerk

Issued as **Mandate:**

Costs To be recovered by
Appellant

Filing fee	$25.00
Printing	$ —
Total	**$25.00**

SUPREME COURT OF THE UNITED STATES

No. 73-2055

SECURITIES INVESTOR PROTECTION CORPORATION,
Petitioner,
v.
JAMES C. BARBOUR, *et al.*

ORDER ALLOWING CERTIORARI. Filed October 21, 1974.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, limited to the following questions:

"1. Whether customers of a Member have an implied private right to action to compel SIPC to meet its alleged obligations to them under the Act, despite Section 7(b) thereof which grants that right only to the Securities and Exchange Commission?

"2. If such a right of action can be implied, whether a receiver of a Member has standing to maintain it?"

Supreme Court, U. S.
FILED
AUG 19 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-2055

SECURITIES INVESTOR PROTECTION CORPORATION,
Petitioner,

vs.

JAMES C. BARBOUR, RECEIVER and SECURITIES
AND EXCHANGE COMMISSION,
Respondents.

BRIEF IN OPPOSITION

To Petition for Writ of Certiorari

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IN THE

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SECURITIES INVESTOR PROTECTION CORPORATION,
Petitioner,

vs.

JAMES C. BARBOUR, RECEIVER and SECURITIES
AND EXCHANGE COMMISSION,
Respondents.

BRIEF IN OPPOSITION

To Petition for Writ of Certiorari

Respondent, James C. Barbour, Receiver for Guaranty Bond and Securities Corporation ("Guaranty") opposes the Petition for a Writ of Certiorari in this cause because the United States Court of Appeals for the Sixth Circuit correctly decided the issues on appeal and there is no compelling reason why its decision should be reviewed by this Honorable Court.

PRELIMINARY STATEMENT

The principal holding of the Court of Appeals was that the Securities Investor Protection Act ("SIPA") is applicable to a registered broker-dealer conducting normal business operations on the effective date of the Act even though there was then pending an injunction action by the Securities and Exchange Commission and the registrant had been in financial difficulty and in violation of the Commission's "Net Capital Rule" for many months.

Yet, petitioner "reserves" discussion of this issue and bases its Petition upon the necessity for a pronouncement by this Court as to whether or not a private enforcement action is authorized by the Act, whether the United States District Court for the Middle District of Tennessee had *in personam* jurisdiction over it and whether its intervention would be feasible at this stage of the receivership proceeding.

These questions did not appear to be of such paramount importance in the courts below. While petitioner's answer in the District Court raised seven (7) affirmative defenses, the last of which was

> "38. This Court lacks jurisdiction in this proceeding."

it was not alleged that the Act afforded no private cause of action and there was some indication that the question as to the receiver's standing and the *in personam* jurisdiction of the Court was being waived:

> "We don't think the receiver has standing, and the reasons are set forth, but for the purpose of resolving the merits of this problem in this case and only for the purpose of this case, as we stated in our memorandum, we are prepared to waive the objection for this case only, because we do want to get to the problem and get rid of it once and for all, as you do, Your Honor, and as they do.
>
> "So, for the same reasons, while we think there is substantial objection to the jurisdiction of this Court over the person of SIPC, since we have the capacity to waive that objection, we do, provided this matter goes on, and I mean provided as a normal litigated civil case.
>
> "What we don't waive, because we can't waive, is the substantial question in our view of this Court's right to entertain this proceeding at all. If there is a defect in this Court's jurisdiction, which is other than a defect in terms of personal jurisdiction, it has to be resolved."

> Statement of Wilfred R. Caron, petitioner's Associate General Counsel, in the United States District Court on June 7, 1972, page 94 of Appendix filed in Court of Appeals.

The District Court nevertheless ruled on "Personal Jurisdiction" and "Subject Matter Jurisdiction" adversely to petitioner but no cross-appeal was taken. While the Court of Appeals discussed briefly petitioner's challenge to the receiver's standing, it dealt with the attacks on jurisdiction—both subject matter and *in personam*—in a footnote in which it simply adopted the District Court's disposition of these contentions.

It may also be noted that in *Lohf v. Casey*, 466 F.2d 618 (10th Cir. 1972), an action instituted by a trustee in bankruptcy, there is no indication in either the opinion of the trial court (330 F.Supp. 356) or that of the Court of Appeals that petitioner raised any question as to the standing of the trustee, the authorization for a private cause of action or either the subject matter or *in personam* jurisdiction of the Court.

ARGUMENT

I. Customers of an Insolvent Member of SIPC Are Entitled to Demand Protection Under the Act Where Both the Commission and SIPC Have Failed or Refused to Discharge Their Obligations.

On February 2, 1971, only four (4) days after the entry of the Order appointing James C. Barbour as Receiver for Guaranty and certain related companies, the Atlanta Regional Office of the Commission sent information to its headquarters in Washington D.C. on the circumstances of Guaranty, but for some reason this information was not conveyed to SIPC.[1] The receiver proceeded to address himself to his obligations to the customers of the broker-dealer, conducting an audit to identify and determine the ownership of securities in the face amount of some Sixteen Million ($16,000,000.00) Dollars and undertaking to devise and submit to the Court in accordance with its instructions a recommendation for appropriate steps "to protect the diversified interests of religious institutions for which said corporations have been acting as underwriter . . ."

Realizing in early May 1971 that nothing had been heard from either the Commission or SIPC, the receiver instructed his attorney to review the Act and take appropriate steps to obtain its benefits if they were available. On May 27, 1971, the latter wrote to the Chairman of SIPC which constituted its first notice of Guaranty's condition and the pending proceedings.

---

[1] In the District Court, counsel for the Commission stated that he was not able to determine "whether it got lost . . . or whether some lower staff official believed that SIPC intervention wasn't necessary in this case . . ." SIPC counsel stated that it was his understanding, "which is imperfect, because I wasn't at SIPC at the time, but it is my understanding that there was a conscious decision made by somebody, whose name I don't have in my mind right now, at the Commission to the effect that this Act had no application in this." (App. pp. 88, 92).

During the next several months, petitioner obtained a report from the Commission and voluminous materials from the receiver but gave him no indication as to its position with reference to the applicability of the Act. Finally, on September 23, 1971, the receiver's attorney wrote again to the Chairman of SIPC inquiring as to its decision. SIPC's general counsel replied on October 5, 1971 that, while it still did not have certain information which would be helpful, "based on information presently available, this Corporation has no plans for filing an application for the appointment of a Trustee in this proceeding." After further exchanges of correspondence as to SIPC's reasons for declining to intervene and the investigation of receiver's counsel into the circumstances of the Commission's failure to notify SIPC of the condition of Guaranty and also the manner in which jurisdiction was invoked in *Lohf v. Casey* (supra), the receiver filed his Petition seeking a show cause order to require both the Commission and SIPC to indicate why the benefits of the Act should not be made available to Guaranty's customers.

The very recital of the foregoing circumstances demonstrates the necessity for a private cause of action in order to achieve the stated purpose of the Act, i.e. the protection of securities investors. We still do not know whether the Commission's failure to notify petitioner of Guaranty's condition was due to an oversight or a deliberate decision. Since the Commission has taken the position throughout this proceeding that the Act was applicable to Guaranty, and since it had a statutory duty to notify petitioner in any event, and since in February 1971, the receivership proceeding had just been initiated, it must be assumed that the Commission's failure was inadvertent. Yet it has still taken no steps to require SIPC to assist Guaranty's customers.

Petitioner cites numerous cases but relies most heavily upon the Amtrak decision, *National RR Passenger Corp. v. National Association of RR Passengers*, 414 U.S. 453, 38 L.Ed.2d 646

(1974). The distinctions between that case and this one are conclusive.

There was a sharp difference of opinion among the litigants and the courts as to whether or not railroad passengers were the intended beneficiaries of the Amtrak Act. There can be no dispute that Congress enacted the Securities Investor Protection Act for the primary and virtually exclusive benefit of securities investors.

The Amtrak Act provided specifically for one type of private cause of action and the language, by implication excluded any other private causes of action. The SIPA, on the other hand, is silent on the subject except that SIPC was granted the power:

> "(1) To sue and be sued, complain and defend in its corporate name and through its own counsel, in any court, state, or federal."
>
> Section 3(b), 15 U.S.C. § 78ccc(b).

The legislative history of the Amtrak Act indicated Congress's rejection of a proposal to amend Section 307(a) so as to permit any aggrieved party to institute legal proceedings for violations of the law. The legislative history of SIPA contains nothing to suggest that the question of private causes of action was considered, pro or con, at any time.

This Court found that to construe the Amtrak Act to permit private causes of action, except in cases involving labor agreements, would tend to frustrate one of the principal objectives of the Act, namely, to provide an efficient means whereby Amtrak could eliminate uneconomic routes without the necessity of submitting to the time-consuming proceedings of State regulatory bodies or the Interstate Commerce Commission. We fail to see how the allowance of a private cause of action by securities investors can frustrate the principal objective of SIPA, i.e. the protection of such investors, even though it may cause inconvenience, annoyance and additional labor for SIPC.

We feel that the decision in *J.I. Case Co. v. Borak*, 377 U.S. 426, 12 L.Ed.2d 423, 84 S.Ct. 1555 (1964) is more apt. There a unanimous court held that Federal courts have the power to grant all necessary remedial relief in a stockholders suit for violation of Section 14(a) of the Securities Exchange Act of 1934. It was contended that Congress made no specific reference to a private right of action in Section 14(a) but the Court replied:

> "While this language makes no specific reference to a private right of action, among its chief purposes is the 'protection of investors,' which certainly implies the availability of judicial relief when necessary to achieve that result."
>
> 12 L.Ed.2d 427.

The Court further observed that:

> "Private enforcement of the proxy rules provides a necessary supplement to Commission action."
>
> 12 L.Ed.2d 427.

In the later case of *Allen v. Board of Elections*, 393 U.S. 544, 22 L.Ed.2d 1, 89 S.Ct. 817, *Borak* was summarized as follows:

> "We have previously held that a federal statute passed to protect a class of citizens, although not specifically authorizing members of the protected class to institute suit, nevertheless implied a private right of action."
>
> 22 L.Ed.2d 12.

It is interesting to note that in *Allen*, this Court emphasized that the statute provided that the attorney general "*may* institute . . . an action" or "*may* . . . file . . . an application for an order." (22 L.Ed.2d 12). Section 7(b) of SIPA likewise provides that "the Commission *may* apply . . . for an order . . ." (15 U.S.C. § 78ggg) (Emphasis added).

We, therefore, respectfully submit that the Court of Appeals determined this issue in accord with previous decisions of this Court and its decision need not be reviewed.

II. Neither the District Court Nor the Court of Appeals Has Yet Ruled as to Specific Questions Involving Implementation of the Act.

Petitioner seems to be preoccupied with the sanctity of the liquidation procedure prescribed by the Act and to place a slavish devotion to this procedure above any concern it may have for the protection of securities investors. Because the receivership has proceeded to advanced stages and because the receiver has succeeded in minimizing the losses of Guaranty's customers, petitioner argues that it should not be required to have anything to do with the case.

Of course, if the Commission had notified petitioner in early February 1971, and if petitioner had acted promptly, the receivership proceeding could have been succeeded by an SIPC liquidation at that time. Be that as it may, however, the Court of Appeals has done no more than to remand this case "to the district court for processing consistent with (its) opinion and specifically to determine and enforce any rights of Guaranty's customers under the SIPA."

It remains for the District Court to now determine what rights the customers have under the Act and in what manner they may be protected. Petitioner will have a full opportunity to present its views on these issues in light of its interpretation of the Act. It will not do to say, however, that simply because the receivership proceeding has progressed to its late stages and it appears that the loss to customers may not be considerable, petitioner should be relieved of the statutory obligation to such customers which Congress placed upon it. The Act authorizes protection of customers of members of SIPC "notwithstanding the pendency . . . of any . . . equity receivership proceeding . . ." (Section 5, 15 U.S.C., § 78eee(a)(3)(B)).

We, therefore, respectfully submit that the implementation of the Act in this case is a matter which has not yet been reached by the lower courts and, consequently, cannot be reviewed by this Court.

III. There Is No Compelling Reason to Review the *In Personam* Jurisdiction of the District Court.

It would appear that this issue was effectively waived in the District Court, that no cross-appeal was perfected as to the Court's ruling, and no great importance was attached to it in the Court of Appeals.

The significant question here is the applicability of the Act and if it was correctly decided by the Court of Appeals, it would serve no good purpose to require the receiver to reinstitute the action in the District of Columbia. Admittedly, there was no proof introduced in the hearing under the show cause order as to petitioner's activities within the Middle District of Tennessee, but the requirement for such proof was clearly dispensed with by the statement of petitioner's counsel in open court, quoted hereinabove.

The language of Section 3(b) of the Act permitting petitioner to be sued "in any court, State, or Federal" implies that Congress did not intend that securities investors from all over the country would be required to come to Washington in order to seek the protection of the Act.

CONCLUSION

For all of the above reasons, Respondent, James C. Barbour, Receiver, insists that the Petition for Writ of Certiorari should be denied.

Respectfully submitted

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Supreme Court, U. S.
FILED

SEP 9 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-2055

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Respondent,
and

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

REPLY BRIEF

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◆

REPLY BRIEF

Introduction

The Receiver's brief in opposition seeks to discourage review by the suggestion that in one way or another SIPC has waived its right to assert the issues raised by the petition. The only issue the Receiver's brief addresses at all on the merits is whether a right of action in favor of customers is implied by the Securities Investor Protection Act of 1970 ("1970 Act"). As to the importance of the issues the Receiver's brief offers the observation that the issues raised by SIPC's petition "did not appear to be of such paramount importance in the courts below."

Importance of Issues as Viewed Below

Whether the courts below considered particular issues to be of greater or lesser importance than others seems clearly irrelevant. In the final analysis that is a judgment which this Court will make irrespective of the opinions of the parties or the inferior courts. To the extent the Receiver would question SIPC's estimate of the importance of these issues in the courts below, it is sufficient reply that the first Point in its brief in the Court of Appeals challenged the implied right of action asserted by the Receiver.

Waiver—Lack of Cross Appeal

That SIPC did not cross appeal from the District Court's order is of no moment whatever. The Court of Appeals was apparently of that view, despite the Receiver's contention (reasserted here) that SIPC's failure to cross appeal deprived it of the right to challenge *in personam* jurisdiction. In any event, it is well-settled that a party may assert on appeal, in the absence of a cross-appeal, any argument supported by the record to sustain the order of judgment below. *Morley Const. Co.* v. *Maryland Casualty Co.,* 300 U.S. 185, 191 (1937); *United States* v. *American Ry. Express Co.,* 265 U.S. 425, 435 (1924). For that purpose a party is not limited to the *ratio decidendi* of the District Court.

Waiver—Subject Matter Jurisdiction

Utterly inexplicable is the Receiver's representation (at page 2) that in SIPC's answer ". . . it was not alleged that the Act afforded no private cause of action." SIPC's first affirmative defense alleged: "The petition fails to state a claim against SIPC upon which relief can be granted." The sweep of the Receiver's waiver suggestions is not clear. However, there is no need to pursue them if they are

intended to frustrate review of the questions whether an implied right of action exists and whether the Receiver has standing. Those issues go to the court's jurisdiction over the subject matter, involving ultimately the question of whether a "case or controversy" exists within the meaning of Article III, Section 2 of the United States Constitution. *Nat'l R.R. Passenger Corp.* v. *Nat'l Ass'n of R.R. Passengers,* 414 U.S. 453, 456 (1974); *Allen* v. *State Board of Election,* 393 U.S. 544 (1969); *Flast* v. *Cohen,* 392 U.S. 83, 95 (1968); *J. I. Case* v. *Borak,* 377 U.S. 426, 431, 433 (1964); see WRIGHT, LAW OF FEDERAL COURTS 58 (2d ed. 1970). It is elementary that a defect in subject matter jurisdiction cannot be waived by the parties, may be raised for the first time on an appeal, and that even if not raised by the parties the court must examine its jurisdiction *sua sponte.* F.R.C.P. 12(h)(3); *American Fire & Cas. Co.* v. *Finn,* 341 U.S. 6, 17-18 (1951); *United States* v. *Griffin,* 303 U.S. 226, 229 (1938); *Mansfield, C.&L.M.Ry. Co.* v. *Swan,* 111 U.S. 379 (1884); see WRIGHT, *op. cit. supra* at 51; 1 MOORE FEDERAL PRACTICE ¶ 0.60 [4], p. 609 (14th ed. 1974).[1]

Waiver—Personal Jurisdiction

In advancing waiver to avoid review of the personal jurisdiction issue, the Receiver culls certain remarks of SIPC's counsel from the colloquy before the District Court. An excursion through the transcript and a dispute concerning inferences from counsel's remarks are unnecessary. What should have been an ordinary civil action commenced by the proper service of a summons and complaint was facilely handled by the Receiver as a matter ancillary to the receivership *via* a petition and order to show cause served by mail. Not only did SIPC's answer affirmatively plead lack of jurisdiction, but it also denied the personal jurisdiction allegations in the Receiver's petition. Obviously SIPC's objection was timely and sufficient under the Federal Rules of Civil Procedure.

---

[1] As this Court long ago stated in the *Swan* case, III U.S. at 382: ". . . but the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act."

The Receiver's procedure raised very serious questions as to the nature of the proceeding and the procedures which would be followed in what was not commenced or readily identifiable as an ordinary civil action. In an effort to expedite resolution of the substantive issues SIPC merely made a conditional *offer* to put aside its defense of lack of personal jurisdiction *provided* it could be agreed that the proceeding would continue as a normal civil action wherein the parties would be bound by the appropriate provisions of the Federal Rules of Civil Procedure. That offer was made in writing[2] and it is that to which the remarks of SIPC's counsel related. There was no response to that offer and the District Court did not attempt to

implement it. Rather, the District Court ruled on the merits of SIPC's objections to personal jurisdiction, as did the Court of Appeals. Obviously neither court was of the view that SIPC had waived its rights. The District Court was in the best position to appraise the statements of counsel. The Receiver's claim of waiver lacks support in the record and falls woefully short of the rule that a waiver of legal rights can be found only where there is decisive unequivocal conduct from which it can inferred there was ". . . an intentional relinquishment or abandonment of a known right or privilege." ***Johnson* v. *Zerbst*,** 304 U.S. 458, 464 (1938); *Petrowski* v. *Hawkeye Security Ins. Co.*, 350 U.S. 495 (1956); see also *Groves* v. *Prickett*, 420 F.2d 119 (9th Cir. 1970). In the *Petrowski* case this Court held that an objection to personal jurisdiction was waived by a clear written stipulation to that effect. The Receiver's claim of waiver is an insubstantial attempt to convert a commendable unaccepted conditional offer into a damaging unintended unqualified waiver.

Merits of Issues Presented For Review

The Receiver's brief says little concerning the real issues. It is silent on the merits of the personal jurisdiction issue. It is silent on SIPC's contention that the 1970 Act cannot be applied to this completed receivership (Petition at 20-23), but seeks to avoid the important issues raised by the Court of Appeals' rejection of that defense by asserting the Court of Appeals made no determination on this issue.

The Receiver's brief does touch upon the issue of whether the Act implies a private right to bring an enforcement action against SIPC. He fails to refute SIPC's reasons why this question merits review by this Court, and his discussion of the merits leaves unanswered SIPC's analysis and arguments. Essentially, the Receiver attempts to distinguish the *Amtrak* case, makes no comment on the other authorities cited by SIPC and relies on *Allen* v. *State Board of Election,* 393 U. S. 558 (1969) and *J. I. Case Co.* v. *Borak,* 377 U. S. 428 (1964). Brief comment seems appropriate.

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[2] In its memorandum filed with the District Court SIPC stated:

> "It is well settled law that parties cannot confer upon a court jurisdiction over the subject matter if, in fact, jurisdiction is lacking. Although as stated below SIPC is willing to waive its objections to jurisdiction over its person, upon certain reasonable conditions, it is powerless to do so insofar as subject matter jurisdiction is concerned.
>
> SIPC's Qualified Consent To
> Jurisdiction Of Its Person
>
> In the circumstances of this case and *solely* for the purpose of expediting the resolution of the substantive issues presented, assuming *arguendo* this Court has jurisdiction over the subject matter, SIPC will agree to waive its objections to jurisdiction over the person (SIPC), provided and on condition that "Receiver's Petition No. 22" be deemed a complaint in a plenary action, that SIPC's Answer and the Response of the Commission be deemed the responsive pleadings to the petition under Rule 8 of the Federal Rules and that the action proceed as in the normal course of any action commenced in a federal distict court, subject to all of the Federal Rules including but not limited to those pertaining to discovery."

Essentially, the Receiver seems to advance the thesis that if a federal statute is intended to benefit a class of persons, a private right of action to prevent or redress violations of that statute should be inferred. Such a sweeping proposition is unsupported by the cases including those cited by the Receiver. The Receiver's argument is nothing more than a call for judicial legislation. The *Amtrak* case, among others, is solid authority against the Receiver. There this Court adhered to traditional principals of statutory construction and its historic constitutional responsibility to effectuate the laws of Congress. It declined to create a private right of action by a process of judicial interpolation. Emphasizing that the Act was intended for the benefit of "securities investors" the Receiver attempts to distinguish the *Amtrak* case by asserting: "There was a sharp difference of opinion among the litigants and the courts as to whether or not railroad passengers were the intended beneficiaries of the Amtrak Act." (Brief in Opposition, page 6). No justification appears for that comment, and in fact this Court's opinion assumed that passengers were intended beneficiaries.

The *Allen* and *Borak* cases, supra, are most inapposite. Distinctions of substance abound. In *Borak,* a congressional intent to provide a private right of action to enforce the proxy rules under the Securities Exchange Act of 1934 ("Exchange Act") was evident from Section 27 thereof which specifically confers jurisdiction on the federal district courts over "all suits in equity and actions at law to enforce any liability or duty created" under the Exchange Act. In *Allen,* a congressional intent to provide a private right of action to enforce the Voting Rights Act of 1965 was supported by Section 5 thereof. The existence of an implied private right of action was supported by the Securities and Exchange Commission in *Borak* and by the United States in *Allen,* a factor which this Court found "significant" in *Allen.*[3] In both cases this Court observed that the objectives of the statute in question would be seriously hampered absent a private right, although the force of such a consideration as an aid in statutory construction may be diminished in light of the *Amtrak* decision.

The Receiver's reliance on the *Allen* and *Borak* cases is misplaced not only in light of the foregoing but for all of the reasons given in SIPC's petition. Regardless of the merits, however, the Receiver has not demonstrated that this question lacks the requisite importance to warrant this Court's review.

CONCLUSION

For reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[3] In the instant case the SEC's position is that to infer a private enforcement right parallel to the Commission's is inconsistent with the design of the 1970 Act. The SEC stated that the specific language of Section 7(b) of the 1970 Act, authorizing only the Commission to act against SIPC, and the legislative history, suggest that Congress intended that to be the exclusive procedure for compelling SIPC to act. (Memorandum for the Securities and Exchange Commission at 4)

Supreme Court, U. S.
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COMPANY, INC., AND SECURITIES AND EXCHANGE
COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals, reported at 496 F. 2d 145, is printed as Appendix A to the petition for certiorari. The unreported opinion of the district court is printed as Appendix C thereto.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on April 23, 1974. The petition for a writ of certiorari was filed on July 20, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the statutory right of the Securities and Exchange Commission to institute an action to compel the Securities Investor Protection Corporation (SIPC) to discharge its obligations under the Securities Investor Protection Act (the Act) is the exclusive means by which SIPC can be compelled to act, or whether there also exists an implied private cause of action.[1]

STATUTE INVOLVED

Section 7(b) of the Securities Investor Protection Act of 1970[2] provides:

> In the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member of SIPC, the Commission may apply to the district court of the United States in which the principal office of SIPC is located for an order requiring SIPC to discharge its obligations under this chapter and for such other relief as the court may deem appropriate to carry out the purposes of this chapter.[3]

---

[1] While additional questions have been presented by SIPC in its petition, certain of them are merely "stated to preserve them" (Pet., p. 2, n. 3), and none of them has to be reached at this time if the court agrees with the Commission's position that the statutory right of the Commission is exclusive.

[2] 15 U.S.C. 78aaa, *et seq.*

[3] 15 U.S.C. 78ggg(b). Other provisions of the Act are set forth in Appendix D to the petition for certiorari.

STATEMENT

The Securities Investor Protection Corporation was created by the Securities Investor Protection Act of 1970 to provide greater protection to the customers of member broker-dealers.[4] Under the Act, SIPC may apply to a court for a decree initiating liquidation proceedings if it determines that a member has failed or is in danger of failing to meet its obligations to its customers and that one or more specified conditions exists.[5] If the application is granted, SIPC is obligated, if necessary, to advance moneys to meet certain customer claims from a fund established and maintained by required contributionss from its members.[6] Should the fund become insufficient for the purposes of the Act, the Securities and Exchange Commission is authorized to make loans to SIPC and to issue notes for this purpose to the Secretary of the Treasury in an aggregate amount not to exceed $1,000,000,000.[7] The Securities and Exchange Commission is also given certain supervisory authority over SIPC, and it is specifically authorized to apply to a district court for an order requiring SIPC to discharge its obligations under the Act.[8]

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[4] 15 U.S.C. 78ccc(a); S. Rep. No. 1218, 91st Cong., 2d Sess., p. 1; H. Rep. No. 1613, 91st Cong., 2d Sess., p. 1.

[5] 15 U.S.C. 78eee(a)(2).

[6] 15 U.S.C. 78fff(f).

[7] 15 U.S.C. 78ddd(g) and (h).

[8] 15 U.S.C. 78ggg.

From June 20, 1962, until after the effective date of the Securities Investor Protection Act on December 30, 1970, Guaranty Bond and Securities Corporation (Guaranty Bond) was a broker-dealer registered with the Securities and Exchange Commission pursuant to Section 15(b) of the Securities Exchange Act of 1934[9] (Pet. App. C, p. C-2). On December 22, 1970, the Commission filed a complaint and moved for a preliminary injunction against Guaranty Bond, alleging, *inter alia*, that Guaranty Bond was and had been in violation of the Commission's "net capital rule"[10] (Pet. App. A, p. A-1).

On January 6, 1971, the district court found that Guaranty Bond had been in violation of the net capital rule for a substantial period of time prior to the filing of the complaint and issued a preliminary injunction against further violations (Pet. App. A, pp. A-1—A-2; Pet. App. C, p. C-1). On January 29, 1971, on the Commission's motion, the court appointed a receiver for Guaranty Bond (Pet. App. C, pp. C-1—C-2).

On March 31, 1972, after the receiver had substantially completed the liquidation of Guaranty Bond, he filed a petition with the district court in the Commission's injunction action asking that SIPC and the Commission be ordered to show cause why SIPC should not be required to intervene in the action and extend the protection of the Act to the customers of the brokerage firm (Pet. App. A, p. A-2). The district court issued the requested order and subsequently filed a Memorandum Opinion (Pet. App. C) in which it held: (1) The receiver could maintain an action against SIPC on behalf of the customers of Guaranty Bond (Pet. App. C, pp. C-4—C-5), but (2) the customers of the firm were not entitled to protection under the Act because the evidence demonstrated that the firm was "hopelessly insolvent" prior to the effective date of the Act, and "to grant the requested relief would be a retroactive application of the Act and a clear frustration of legislative intent" (Pet. App. C, pp. C-5—C-7).

The district court stated, however, that Guaranty Bond continued to do business until January 6, 1971, and that it handled 101 transactions between December 30, 1970, the effective date of the Act, and January 6, 1971, the date on which the preliminary injunction was issued (Pet. App. C, p. C-1).

The court of appeals agreed with the district court that the receiver had standing to bring an action seeking the customer protections provided under the Act (Pet. App. A, pp. A-8—A-10), but it reversed the determination that Guaranty Bond's customers were not entitled to protection under the Act in light of the substantial business conducted by Guaranty Bond after the effective date of the Act (Pet. App. A, pp. A-5—A-8).

DISCUSSION

The court of appeals erred in concluding that the receiver of a broker-dealer, who represents the interests of the firm's customers, has an implied right to compel SIPC to file an application to commence liquidation proceedings under the Act. The implication of such a private cause of action is contrary to the principle this Court recently enunciated in ***Nat'l R.R. Passenger Corp.*** v. ***Nat'l Ass'n of R.R. Passengers***, 414 U.S. 453, 458:

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[9] 15 U.S.C. 78o(b).

[10] 17 C.F.R. 240.15c3-1.

"[T]he inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act." Here, neither the legislative intent nor the purposes of the Act are consistent with such an inference.

The Act contemplates that SIPC will be subject to substantial supervision by the Commission, acting in the public interest; to infer that a receiver representing private investors possesses an enforcement right parallel to the Commission's is inconsistent with the design of the Act. Section 7(b) authorizes the Commission to apply to "the district court of the United States in which the principal office of SIPC is located for an order requiring * * * " SIPC to act. In light of the statutory pattern, this specific language authorizing only the Commission to act against SIPC suggests that Congress intended that to be the exclusive procedure for compelling SIPC to act. *Nat'l R.R. Passenger Corp.* v. *Nat'l Ass'n of R.R. Passengers*, *supra*; *Botany Worsted Mills* v. *United States*, 278 U.S. 282; *Bohart-McCaslin Ventures, Inc.* v. *Midwestern Securities Corp.*, 352 F. Supp. 937 (N.D. Tex.). Nor does the legislative history of the Act indicate that Congress intended that there be a private right of action against SIPC, in addition to the authority given to the Commission.[11]

Moreover, as SIPC points out in its petition (Pet., p. 14), the public interest, not merely the private interests of customers of a broker-dealer, must be considered in determining whether liquidation proceedings should be commenced in a particular instance. Often, although the bases for such proceedings exist, forbearance may allow time for other viable solutions such as the infusion of new capital, the transfer of accounts to a healthy firm, or the merger, acquisition or self-liquidation of the troubled firm. In addition, sophisticated financial analysis and the application of complicated rules and regulations may be involved in a determination to forbear.

Because of the Commission's responsibilities to regulate broker-dealers under the Securities Exchange Act of 1934[12] and to supervise SIPC under the Securities Investor Protection Act,[13] the Commission, and not a receiver of a broker-dealer, should determine whether SIPC has acted improperly in not instituting liquidation proceedings.[14] A broker-dealer's customer or its representative would rarely consider the public interest in determining whether to bring an action to compel proceedings under the Act. As SIPC points out (Pet., p. 15), such an action might be brought with respect to a firm in weak but not terminal financial condition and as the result of legitimately disputed transactions between the firm and the customer; such an action, because of the attendant unfavorable publicity, could start a fatal run on the firm. Moreover, by bringing an action prematurely a customer might destroy viable alternatives to liquidation proceedings.

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[11] The House Report states only:

> Section 7(b) of the bill provides that, should SIPC refuse to commit its funds or otherwise act for the protection of customers of any member, the Commission could apply to a court for an order requiring SIPC to discharge its obligations under this legislation or for such other relief as the court may deem appropriate to carry out the purposes of the legislation—for example, requiring SIPC to file an application under section 5.

H. Rep. No. 1613, 91st Cong., 2d Sess., p. 22.

[12] 15 U.S.C. 78a, *et seq.*

[13] The House Report states:

> Your committee has, however, provided for substantial oversight on the part of the Commission over the conduct of the affairs of SIPC. * * *
>
> * * * * *
>
> Your committee, not only directs, but expects the Commission to use its oversight in a vigorous, but fair, manner. Only with the cooperation and coordination between the efforts of the self-regulatory organizations, SIPC and the Commission, can this legislation see its fullest effectiveness.

H. Rep. No. 1613, 91st Cong., 2d Sess., p. 12.

CONCLUSION

For the foregoing reasons, the Commission is of the view that the court of appeals erred in holding that the receiver of a broker-dealer has an implied right to compel SIPC to file an application to commence liquidation proceedings under the Act.

The Commission has had insufficient experience under the Act, however, to have any opinion whether the issue is sufficiently important in the administration of the Act to warrant review by this Court.

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SEPTEMBER 1974.

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[14] We do not maintain that Congress intended that the protections of the Act might be arbitrarily withheld from customers of an insolvent broker-dealer whose claims cannot otherwise be satisfied. See S. Rep. No. 1218, 91st Cong., 2d Sess., p. 3; H. Rep. No. 1613, 91st Cong., 2d Sess., p. 3. It may be, therefore, that a determination by the Commission not to take action under Section 7(b) would be judicially reviewable for abuse of discretion.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

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ON WRIT OF CERTIORARI TO THE UNITED STATES
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Argument

I—Section 7(b) of the Act confers upon the Commission, as part of its pervasive supervisory powers over SIPC, the exclusive right to obtain judicial review of SIPC's corporate discretion when SIPC determines that its intervention in a particular case would not be a proper application of the terms, policy or plan of the Act 17

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2055

Securities Investor Protection Corporation,
Petitioner,
v.
James C. Barbour, as Receiver for Guaranty Bond and Securities Corporation and Guaranty Bond Company, Inc.,
Respondent,
and
Securities and Exchange Commission,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals, reported at 496 F.2d 145, appears at page 80 of the Single Appendix (hereinafter "SA"). The unreported opinion of the District Court appears at SA 72.

Jurisdiction

The judgment of the Court of Appeals was entered on April 23, 1974 (SA 90). The petition for a writ of certiorari was filed on July 20, 1974, and was granted on October

21, 1974, 95 S.Ct. 172. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

The Securities Investor Protection Act of 1970 ("Act") created the Securities Investor Protection Corporation ("SIPC"), a nonprofit membership corporation consisting of most broker-dealers ("Members"). Among other things the Act authorizes SIPC to institute a proceeding for the liquidation of a Member in an appropriate case (*e.g.*, insolvency) for the protection (*via* SIPC's funds) of its public securities customers. As limited by this Court's order granting certiorari (SA 92) the questions presented are:

> 1. Whether customers of a Member have an implied private right of action to compel SIPC to meet its alleged obligations to them under the Act, despite Section 7(b) thereof which grants that right only to the Securities and Exchange Commission ("Commission")?[1]
>
> 2. If such a right of action can be implied, whether a receiver of a Member has standing to maintain it?

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[1] SIPC's petition for certiorari limited the question to customers of a Member because of the facts in this case. However, the Commission's Memorandum supporting SIPC's petition stated this question more broadly, *i.e.* "Whether the statutory right of the Securities and Exchange Commission to institute an action to compel the Securities Investor Protection Corporation (SIPC) to discharge its obligations under the Securities Investor Protection Act (the Act) is the exclusive means by which SIPC can be compelled to act, or whether there also exists an implied private cause of action." SIPC respectfully suggests that this slightly broader question is necessarily involved in light of the required statutory analysis.

Statutes Involved

The section of the Act directly involved is section 7(b)[2] which provides:

> "ENFORCEMENT OF ACTIONS. — In the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member of SIPC, the Commission may apply to the district court of the United States in which the principal office of SIPC is located for an order requiring SIPC to discharge its obligations under this chapter and for such other relief as the Court may deem appropriate to carry out the purposes of this chapter."

Other principal sections necessarily involved are sections 5(a)(1) and 5(a)(2)[3] which provide respectively:

> "NOTICE TO SIPC.—If the Commission or any self-regulatory organization is aware of facts which lead it to believe that any broker or dealer subject to its regulation is in or is approaching financial difficulty, it shall immediately notify SIPC, and, if such notification is by a self-regulatory organization, the Commission."—section 5(a)(1)
>
> "ACTION BY SIPC.—If SIPC determines that any member has failed or is in danger of failing to meet its obligations to customers and that there exists one or more of the conditions specified in subsection (b)(1)(A) of this section, SIPC . . . may apply . . . for a decree adjudicating that customers of such member are in need of the protection provided by this chapter."—section 5(a)(2)

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[2] 15 U.S.C. § 78ggg(b). Hereinafter, for convenience citations to the Act as set forth in the United States Code will not include "15 U.S.C."

[3] §§ 78eee(a)(1) and (2).

Respondent Receiver has cited section 3(b)(1)[4] which includes, among SIPC's enumerated general corporate powers, the power—

> "(1) to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State, or Federal;"

For the Court's convenience sections 5 and 6[5] of the Act, to which many references will be made, are entirely set forth in the Appendix hereto.

Summary of the Case

Prior Proceedings

Commission's Action. Guaranty Bond and Securities Corporation ("Guaranty Bond") was registered as a broker-dealer pursuant to section 15(b) of the Securities Exchange of 1934[6] ("Exchange Act") (SA 2).[7] In December, 1970 (prior to the Act's effective date) the Commission commenced an action against Guaranty Bond, its principals and its parent, Guaranty Bond Company, Inc. (SA 1). The Commission sought to enjoin certain fraudulent and other conduct violative of the Exchange Act and the Securities Act of 1933.[8] On January 6, 1971 the District Court granted a preliminary injunction (SA 41).

Scope of Receivership. On January 27th the District Court granted the Commission's motion for the appointment of a receiver after finding that Guaranty Bond and its parent were insolvent (SA 60). The Court's memorandum decision directed, *inter alia:*

> "A receiver will be appointed and, absent any bankruptcy proceedings, he will conserve, administer and liquidate the affairs and assets of the defendant corporations."

On January 29th an order was entered (SA 54) appointing James C. Barbour as Receiver, conferring upon him usual powers to marshal and preserve the corporate assets, and authorizing him "to determine, adjust and protect the equities of creditors, customers and investors whose funds and other properties have been entrusted to or invested with said corporations." (SA 55, par. 3)[9]

SIPC's Decision Not To Intervene. SIPC first learned of the Guaranty Bond situation when it received a letter dated May 27, 1971 from the Receiver's counsel requesting "protection under the Act."[10] SIPC declined to intervene because of the scope, nature and practical completion of the liquidating receivership, and because both Guaranty Bond's hopeless insolvency and the Commission's action occurred before the Act's effective date (SA 39).

Receiver's Enforcement Proceeding

The Receiver's instant proceeding was commenced in April, 1972 by petition and an order of the District Court directing the Commission and SIPC to show cause ". . .

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[4] § 78ccc(b)(1).

[5] §§ 78eee and fff.

[6] 15 U.S.C. § 78*o*(b).

[7] This Court's limited grant of certiorari would appear to have given finality to the Court of Appeals' decision that Guaranty Bond was also a Member of SIPC.

[8] 15 U.S.C. § 77a *et seq.*

[9] By the end of May, 1971, when SIPC first learned of the Guaranty Bond situation, the receivership had been expanded to include various other enterprises (not broker-dealers) affiliated with Guaranty Bond, the liquidation of Guaranty Bond and affiliates was substantially completed, and all securities (more than 15 million dollars worth) had been returned to their owners.

[10] The Receiver admits his awareness of the Act "shortly after his appointment" four months earlier (SA 19).

why the remedies afforded by the Act should not be made available in this proceeding." (SA 28)

Receiver's Petition (SA 19). The Receiver alleged that he believed "the customers of Guaranty Bond and Securities Corporation are entitled to the protection of the Act." He acknowledged, however, that customers had received their bonds and credit balances and that their losses (if any) would result from a court-ordered deposit by customers equal to five percent of the principal amount of their bonds in order to defray part of the receivership expenses (SA 22, par. 13). Moreover, most of that deposit has since been refunded.[11]

Commission's Answer (SA 62). Among other things the Commission alleged in substance that SIPC's intervention would be needed only if customers actually sustained losses, and that such losses had not been demonstrated adequately especially since the Receiver might have causes of action against Guaranty Bond's principals which would benefit customers. The District Court had made extensive findings of fraudulent, dishonest and manipulative conduct by Guaranty Bond's principals, and cited their admissions of siphoning earnings from Guaranty Bond to its parent and wrongfully taking secret profits (SA 50, par. 19). It is undisputed that the Receiver has taken no action against those principals.

SIPC's Answer (SA 29). Among other things SIPC denied that Guaranty Bond's customers were in need of the Act's protection. It also alleged seven affirmative defenses including defenses (i) that the petition failed to state a claim upon which relief could be granted, (ii) that the court lacked jurisdiction, and (iii) that SIPC's refusal to intervene under the circumstances was either required by the Act or was a proper exercise of its corporate powers and discretion.

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[11] The Receiver's counsel has confirmed that the deposit now stands at only 1½ percent.

District Court's Opinion

The District Court sustained its subject matter jurisdiction and the Receiver's standing to maintain this proceeding stating, in part, that ". . . the default or neglect of the Commission to institute enforcement proceedings under § 7(b) should give rise to a similar cause of action by a receiver in behalf of a member's customers."[12] However, it dismissed the Receiver's petition on the ground that the Act was not intended to apply to broker-dealers, such as Guaranty Bond, who were hopelessly insolvent or in substantial net capital violation before the Act's effective date.

Court of Appeals' Opinion

The Court of Appeals also upheld the Receiver's standing. It held that customers of a Member have a right to bring an enforcement action against SIPC because of "the lack of express language of exclusivity in providing for an enforcement action by the S.E.C., coupled with a general provision allowing for suits against the S.I.P.C." It then sustained the Receiver's standing to maintain such an action on the ground that the Receiver, as the "representative" of Guaranty Bond's customers, meets the tests enunciated in *Sierra Club* v. *Morton,* 405 U.S. 727 (1971) and *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150 (1970). However, the Court of Appeals reversed the District Court and held that the Act applied to Guaranty Bond, despite its financial collapse in 1970, because it was allegedly ". . . in fact, a broker or dealer at the effective date of the Act."

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[12] There was no proof of default or neglect by the Commission.

Structure of the Act

Background

Prior to the Act stockbroker bankruptcies were conducted in accordance with section 60e of the Bankruptcy Act (11 U.S.C. §96e). Although securities customers were accorded preferential participation in a "single and separate fund", consisting generally of cash and securities held for their accounts, the bankrupt's depleted assets usually left them suffering losses. During the late 1960's the securities industry encountered a period of serious decline.[13] The New York, American and other Exchanges had voluntarily established trust funds to protect customers of failing member firms *via* self-liquidation procedures outside the Bankruptcy Act.[14] However that effort was unable to meet the mounting crisis.[15] Moreover, such trust funds were not available to customers of broker-dealers who were not members of those Exchanges.[16] To meet the situation and to bolster public investor confidence partly through a legislated fund, Congress broadly analogized to the Federal Deposit Insurance Corporation[17]

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[13] S.Rep. No. 91-1218, 91st Cong., 2d Sess. 3 (1970) ("Senate Report"); see also H.R. Rep. No. 91-1613, 91st Cong., 2d Sess. 2 (1970) ("House Report").

[14] *Hearings on S. 2348, S. 3988, S. 3989 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency,* 91st Cong., 2d Sess. 149, 160, 191 (1970). *Hearings on H.R. 13308, H.R. 17585, H.R. 18081, H.R. 18109, H.R. 18458 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce,* 91st Cong., 2d Sess. 1 (1970). These hearings will hereinafter be cited as "Senate Hearings" and "House Hearings." See also House Report at 3; Senate Report at 3.

[15] House Report at 3; Senate Hearings at 172.

[16] House Report at 3; Senate Report at 3; House Hearings at 152.

[17] House Report at 2; Senate Report at 4; Senate Hearings at 2, 8, 15.

and enacted a new program which was jointly sponsored by the securities industry and the Commission.[18] The several purposes of that program were stated thusly:

> ". . . to protect individual investors from financial hardship; to insulate the economy from the disruption which can follow the failure of major financial institutions; and to achieve a general upgrading of financial responsibility requirements of brokers and dealers to eliminate, to the maximum extent possible, the risks which lead to customer loss."[19]

The Act accomplished these purposes essentially by two methods. First, it enhanced the Commission's powers to establish financial responsibility rules for brokers and dealers[20] and to impose on the self-regulatory organizations[21] requirements for the financial examination of their members.[22] Second, it created SIPC which it empowered to commence proceedings for the liquidation of its Members whose financial condition posed the threat of loss to their customers ("Liquidation Proceeding"). In a Liquidation Proceeding customers are protected by SIPC's funds. Congress placed responsibility for its new program on the Commission, SIPC and the industry's self-regulatory organizations.

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[18] House Report at 28; Senate Hearings at 12; House Hearings at 330.

[19] Senate Report at 4; see also House Report at 1.

[20] Section 7(d), §78ggg(d).

[21] Defined in Section 12(1), §*78lll*(1), "self-regulatory organizations" currently consist of national securities exchanges and the National Association of Securities Dealers, Inc.

[22] Section 9(f), §78iii(f). Similarly SIPC is given responsibility to work with the self-regulatory organizations toward the standardization of their examining procedures and the development of procedures for the early detection of approaching financial difficulty of SIPC Members. Section 9(e), §78iii(e).

SIPC Organization & Fund

SIPC is not an insurance company. It was conceived[23] and created as a private, non-profit, industry-funded membership corporation which would work within the self-regulatory structure of the securities industry.[24] Its Board consists of seven persons, five appointed by the President and confirmed by the Senate, and two designated respectively by the Federal Reserve Board and the Secretary of the Treasury.[25] Most broker-dealers are required to be SIPC members and to pay assessments to SIPC.[26] If SIPC's funds should be inadequate to carry out its purposes the Act authorizes a loan of up to one billion dollars from the United States Treasury.[27]

Commission Supervision

Although Congress plainly stated its intention that SIPC function as part of the self-regulatory structure, it was equally clear in stating its intention that, for SIPC, "self-regulation" stopped short of broad Commission supervision. As the House Report stated (at 12):

> "Your committee has, however, provided for substantial oversight on the part of the Commission over the conduct of the affairs of SIPC.
>
> * * * * *
>
> "Your committee, not only directs, but expects the Commission to use its oversight in a vigorous, but fair, manner." (See also footnote 30, *infra.*)

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[23] Senate Hearings at 231-233, 271-272; House Hearings at 199 *et seq.*, 365. See also House Report at 11-13.

[24] Sections 3(a) and 4, §§ 78ccc(a) and 78ddd. A particularly good statement of SIPC's role in the self-regulatory structure is contained in the House Report at 11-12 ("Commission Oversight").

[25] Section 3(c), § 78ccc(c).

[26] Sections 3(a)(2) and 4(c), §§ 78ccc(a)(2) and 78ddd(c).

[27] Section 4(f)-(h), § 78ddd(f)-(h).

Prompted in part by the availability of United States funds,[28] the Congress granted the Commission extensive supervisory powers over SIPC, including the Commission's right to bring an enforcement action against SIPC if it refuses to act for the protection of its Members' customers.[29] The Commission's powers also include (i) approval of SIPC's bylaws and rules, reinforced by the extraordinary power to "require the adoption, amendment, alteration of, supplement to or rescission of any bylaw or rule by SIPC, whenever adopted"; (ii) the approval of certain financial decisions involving SIPC's credit and funds, and (iii) effective control over matters relating to the borrowing and repayment of United States funds.[30] Additionally the Commission is empowered (i) to adopt rules adjusting certain provisions of the Act relating to the protection of customers, (ii) to determine the Act's applicability to the foreign operations of SIPC members, and (iii) on its own motion to participate as a party in any Liquidation Proceeding commenced by SIPC.[31] SIPC is required to make annual reports of its operations to the

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[28] Senate Hearings at 243; House Hearings at 219-220, 345.

[29] Section 7(b), § 78ggg(b).

[30] Sections 3(c)(2)-(3), 4(d)(2)(B), 4(e)(1) and 4(f)-(g); §§ 78ccc(e)(2)-(3), 78ddd(d)(2)(B), 78ddd(e)(1), and 78ddd(f)-(g). SEC Chairman Hamer H. Budge succinctly stated the Commission's oversight powers: "Actually the operation of the corporation, even the setting up under the original bylaws, is *under the nose*, so to speak, *of the SEC*. We can veto the initial bylaws if we want to, or any portion of them." Senate Hearings at 277 (emphasis added). See 116 Cong. Rec. 39344 (1970) (remarks of Mr. Latta): "The bill gives to the Securities and Exchange Commission continuing oversight and rulemaking authority over the affairs of the Corporation to insure that the public interest is served." See also *id.* at 39347, 39348, 39352, 39366 (remarks of Messrs. Staggers, Springer, Eckhardt and Keith).

[31] Sections 6(c)(2)(C)(iii), 6(d)(1) and (2), and 11(b); §§ 78fff(c)(2)(C)(iii), 78fff(d)(1) and (2), and 78kkk(b).

Commission which transmits them to the President and the Congress, with such comments as it deems appropriate.[32]

SIPC Reliance on Commission And Self-Regulatory Organizations

SIPC has no authority to examine its Members. It depends on the self-regulatory organizations and the Commission for information. The Act requires them to notify SIPC immediately when they believe that any broker-dealer subject to their regulation is in, or is approaching, financial difficulty.[33] Because violations of the federal securities laws are usually involved, in most cases SIPC commences a Liquidation Proceeding simultaneously with, or immediately after, an injunction action commenced by the Commission against the Member. The Act permits SIPC to combine its Liquidation Proceeding with any action brought by the Commission.[34]

Nature of Liquidation Proceeding

SIPC's authority to commence a Liquidation Proceeding for the protection of customers is an important aspect of the Act's program.[35] This responsibility also has aspects of enforcement. Thus, the Act authorizes liquidation of a SIPC Member which is not in compliance with applicable requirements under the Exchange Act, or rules of the Commission or a self-regulatory organization with respect to financial responsibility or hypothecation of customers' securities.[36] It is even permitted if a Member cannot make the computations necessary to establish such compliance.[37] If these or other specified conditions exist (*e.g.*, insolvency),[38] and if SIPC determines that a Member "has failed or is in danger of failing to meet its obligations to its customers," SIPC "may" commence a Liquidation Proceeding.[39] Whether and when it does depends upon its exercise of the discretion granted it.[40]

SIPC does not itself liquidate its members. It is merely authorized to commence a Liquidation Proceeding in the appropriate federal district court. The Member involved is entitled to contest SIPC's allegations.[41] Where the Member consents or SIPC prevails, the court is required to appoint persons designated by SIPC to serve as trustee and counsel[42] to carry out the purposes of the Liquidation Proceeding which is governed by the Act and certain provisions of the Bankruptcy Act.[43] Essentially a Liquidation Proceeding is a custom-made bankruptcy proceeding similar to the usual stockbroker bankruptcy conducted in accordance with section 60e of the Bankruptcy Act. A Liquidation Proceeding can be complex.[44] In the course thereof SIPC's funds provide limited protection to the Member's customers.

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[32] Section 7(c)(2), § 78ggg(c)(2).

[33] Section 5(a)(1), § 78eee(a)(1).

[34] Sections 5(a)(3)(A), 5(c); §§ 78eee(a)(3)(A), 78eee(c).

[35] House Hearings at 219-220

[36] Sections 5(a)(2), 5(b)(1)(A); §§ 78eee(a)(2), 78eee(b)(1)(A).

[37] *Id.*

[38] *Id.*

[39] Section 5(a)(2), § 78eee(a)(2).

[40] Senate Report at 11; House Hearings at 200, 236-237, 331-333, 340-341; Senate Hearings at 259-260.

[41] Section 5(b)(1)(B); § 78eee(b)(1)(B).

[42] Section 5(b)(3); § 78eee(b)(3).

[43] Section 6(c)(1); § 78fff(c)(1).

[44] Duffy, *Reforming SIPC,* 7 REV. SEC. REG. 985, 990 (1974).

Customer Protection In Liquidation Proceeding

The Act was intended to provide for ". . . the prompt and orderly liquidation of SIPC members when required."[45] Section 6 contains detailed procedural and substantive provisions which determine the rights of customers and SIPC. With some variation it substantially tracks the provisions of section 60e of the Bankruptcy Act; the latter are therefore made inapplicable to a Liquidation Proceeding.[46] Some of the pertinent section 6 provisions are summarized below,[47] but there are many others (see Appendix hereto). As that summary shows, the Act does not attempt to make all customers whole. It establishes a plan of limited protection *via* the carefully delineated Liquidation Proceeding.

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45. House Report at 9; see also Senate Hearings at 303.

46. Section 6(c)(1), §§ 78fff(c)(1).

47. The term "customer" is defined in great detail [Section 6(c)(2)(A)(ii); § 78fff(c)(2)(A)(ii)]. Such customers are entitled to the return of their specifically identifiable property, as defined [Sections 6(c)(2)(C), 6(c)(2)(A)(i); §§ 78fff(c)(2)(C), §§ 78fff(c)(2)(A)(i)]. All customers' property (except specifically identifiable property) constitutes a single and separate fund (the "Fund") for the benefit of customers [Section 6(c)(2)(B); § 78fff(c)(2)(B)]. Customers are entitled to share prorata in the Fund, based on the value of the "net equity" of their account (excluding specifically identifiable property) as of the "filing date" [Sections 6(c)(2)(A)(iv), 5(b)(4)(B); §§ 78fff(c)(2)(A)(iv), 78eee(b)(4)(B)]. If the Fund is insufficient to satisfy all customers' net equities the balance of their claims share in the general estate with general creditors [Section 6(c)(2)(B); §§ 78fff(c)(2)(B)]. Customers are protected by SIPC's funds only to the extent their net equities cannot be satisfied from the Fund and the general estate, and then only up to $50,000 per customer of which only $20,000 is available for cash claims [Section 6(f)(1); § 78fff(f)(1)]. In determining the unsatisfied amount of net equities, securities returned in partial satisfaction of securities claims are valued as of the "filing date" regardless of actual value at time of distribution [Section 6(c)(2)(B); § 78fff(c)(2)(B)]. Certain customers (specified insiders of the Member, and banks and broker-dealers not acting for customers) are entirely excluded from SIPC protection [Sections 6(f)(1)(C) and(D); §§ 78fff(f)(1)(C)and (D)].

It contemplates that customers' claims will be satisfied to the maximum extent possible from the assets already on hand with the Member. SIPC's funds merely supplement those assets within the limits and in the manner provided by the Act,[48] subject to SIPC's subrogation and recoupment rights (discussed below). The scope of customer protection and SIPC's exposure depends upon careful adherence to the statutory scheme.[49]

Completion of Certain Contracts

The Act was not intended for the protection of brokers and dealers.[50] However, after a Liquidation Proceeding is commenced to protect a Member's customers the Act authorizes the trustee in liquidation to complete certain open contractual commitments between the Member and another broker-dealer.[51] This authority was designed to avoid the so-called "domino effect", namely, the chance that the demise of a Member might precipitate the failure of one or more other broker-dealers.[52] Consistent with the Act's purpose to protect public customers, this provision applies

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48. *Id.*

49. For example, there must be the correct identification of protected customers, the proper determination of their net equities, the valuation of their securities as of the "filing date" regardless of subsequent changes in value, the pro-rata distribution of securities when required, the enforcement of SIPC's rights of recoupment and subrogation, the avoidance of preferential transfers, and the vigorous pursuit of recoveries against a Member's principals and employees as well as third parties.

50. Senate Hearings at 257. See also *SEC* v. ***Packer Wilbur & Co., Inc.***, 498 F. 2d 978, 984 (2d Cir. 1974).

51. Section 6(d), § 78fff(d).

52. House Report at 9; Senate Report at 4, 11; Senate Hearings at 147. See also *SEC* v. *Aberdeen Securities Co., Inc.*, 480 F. 2d 1121, 1125 (3d Cir.), *cert. denied,* 414 U.S. 1111 (1973).

only to commitments "in which a customer has an interest" unless the Commission in the public interest otherwise determines.

SIPC's Subrogation and Recoupment Rights

SIPC is not liable to the liquidated Member in any respect, its funds being available solely as advances to the trustee for the satisfaction of protected customers' claims and other specified purposes. Accordingly, (i) to the extent of its advances for customers it is subrogated to their claims and priorities against the Member's estate;[53] (ii) to the extent it advances funds for the completion of certain of the Member's open contractual commitments (discussed above) it enjoys a first priority right of recoupment;[54] and to the extent it advances administrative expenses it enjoys a priority right of recoupment under the express terms of the Act,[55] and through the operation of section 64a(1) of the Bankruptcy Act.[56]

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[53] Section 6(f)(1), § 78fff(f)(1); see also note 47 *supra.*

[54] Section 6(c)(2)(B)(i), § 78fff(c)(2)(B)(i).

[55] Section 6(c)(2)(B)(ii), § 78fff(c)(2)(B)(ii).

[56] *Id.*

ARGUMENT

I

Section 7(b) of the Act confers upon the Commission, as part of its pervasive supervisory powers over SIPC, the exclusive right to obtain judicial review of SIPC's corporate discretion when SIPC determines that its intervention in a particular case would not be a proper application of the terms, policy or plan of the Act.

A. The Statutory Context in Which Section 7(b) Was Intended To Function Makes The Exclusivity Of The Remedy An Imperative Conclusion

The exclusivity of the enforcement remedy which section 7(b) added to the Commission's broad supervisory powers is evident from its terms and the extraordinary character of the remedy itself. However, this Court has often counselled that a statutory provision should be read in context and applied in harmony with other provisions and the legislative purpose,[57] not in a manner which would produce incongruous results[58] or make the statute work in a way which Congress did not intend.[59] It therefore seems appropriate to amplify the previous discussion ("Structure Of The Act") by bringing sharper focus upon certain aspects of the operation of the Act which seem especially germane to considerations deemed relevant by members of this Court in two cases upon which SIPC relies as controlling here, namely, *National R. R. Passenger Corp.* v. *National Association of R. R. Passengers*, 414 U.S. 453 (1974) and *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297 (1943).

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[57] See, *e.g., Boys Markets, Inc.* v. *Retail Clerk's Union,* 398 U. S. 235, 250 (1970); *Richards* v. *United States,* 369 U. S. 1, 11 (1962); *N.L.R.B.* v. *Lion Oil Co.,* 352 U. S. 282, 288 (1957); *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 439 (1935).

[58] See, *e.g., N.L.R.B.* v. *Lion Oil Co.,* 352 U. S. at 288; *Mastro Plastics Corp.* v. *N.L.R.B.,* 350 U. S. 270, 285 (1956); *United States* v. *Menasche,* 348 U.S. 528, 538-39 (1955).

[59] See, *e.g., United States* v. *Sisson,* 399 U. S. 267, 298 (1970); *Perry* v. *Commerce Loan Co.,* 383 U. S. 392, 400 (1966).

Self-Regulatory Mechanism At Work Under The Act

Having established *via* SIPC an industry and government financial commitment for the protection of the investing public, Congress made careful provision "for upgrading the financial responsibility requirements of brokers and dealers"—one of its declared objectives.[60] The existing self-regulatory and Commission network of surveillance of brokers and dealers was drawn tighter not only to avoid the financial collapse of firms and resultant customer loss, but also to provide a system to assure prompt protective action by SIPC when appropriate. Toward these ends the Act also directed SIPC to consult and cooperate with the self-regulatory organizations in several areas, including the development and implementation of "procedures reasonably designed to detect approaching financial difficulty upon the part of any member of SIPC."[61]

Compliance with that directive was necessarily delayed. The Act became effective immediately on the date of

enactment, December 30, 1970. Time elapsed before SIPC was fleshed out with personnel and procedures.[62] However, SIPC has now held two annual conferences with representatives of most (all major) self-regulatory organizations and the Commission.[63] Partly as a result of those conferences and other SIPC initiatives, and significantly as a result of the independent initiatives of the self-regulatory organizations and the Commission, there now exist highly developed systems of broker-dealer surveillance to detect approaching financial difficulty.[64] As a result SIPC is kept aware of troubled firms on an "early warning" basis.

Liquidation Proceedings—SIPC's Discretion and Responsibility

A Liquidation Proceeding is the sole vehicle by which Congress authorized SIPC to expend its funds for the protection of customers.[65] Congress did not mandate SIPC automatically to commence a proceeding solely if the member is insolvent or falls within one of the other specified conditions.[66] Rather it required SIPC to determine that the Member also "has failed or is in danger of failing to meet its obligations to customers." Even in that event, Congress provided only that SIPC "may" commence a Liquidation Proceeding. The discretion manifestly reposed in SIPC was essential to the achievement of customer protection in a manner consistent with broader public interests.

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[60] See page 9, *supra*. Congress also directed the Commission to compile a study of unsafe and unsound practices of Members of SIPC for Congress' review. Section 11(h), §78kkk(h). The Commission made an extensive study and report. SEC, STUDY OF UNSAFE AND UNSOUND PRACTICES OF BROKERS AND DEALERS: REPORT AND RECOMMENDATIONS OF THE SECURITIES AND EXCHANGE COMMISSION. H. R. DOC. No. 92-231, 92d Cong., 1st Sess. (1971).

[61] Section 9(e)(1); §78iii(e)(1).

[62] This case arose on the eve of the Act's passage. The first Liquidation Proceeding under the Act was commenced on March 29, 1971. *SEC* v. *Howard Carlton, Inc.*, 71 Civ. 419 (S.D.N.Y.)

[63] 3 SIPC ANN. REP. 29 (1973). The first was held in Washington, D. C., September 20 and 21, 1973. 1 SIPC CONFERENCE OF SELF-REGULATORY ORGANIZATIONS REP. 1 *et seq.* (1973) ["1 SIPC CONF. REP."]. The second was held in Washington, D. C., October 10 and 11, 1974.

[64] 3 SIPC ANN. REP. 16-17, 29 (1973); 1 SIPC CONF. REP. 1 *et seq.*, 11-30 (1973); 39 SEC ANN. REP. 59 (1973); Wilson, *NASD SURVEILLANCE*, 7 REV. SEC. REG. 845 (1974).

[65] The Act prohibits any plan of reorganization. Section 6(c)(1); §78fff(c)(1). See also, House Report at 10; Senate Report at 12; 116 CONG. REC. 40905 (1970) (remarks of Mr. Bennett).

[66] See "Nature of Liquidation Proceeding" *supra* at 12-13.

The Liquidation Proceeding is a drastic public remedy which is available to SIPC even in some circumstances which would not sustain an adjudication of bankruptcy. Its impact is far-ranging, in many instances with unavoidable and necessary adverse effect.[67] The liquidation of a major firm[68] teaches the wisdom of Congress' grant of discretion to SIPC. If prudent restraint will permit the implementation of other viable solutions, its exercise will serve the best interests of customers, the industry, the general public, and the funds of SIPC and the United States. The Members and self-regulatory organizations must be allowed to work out the problem, with the Commission's oversight in the public interest. Reasonable forebearance in the commencement of a Liquidation Proceeding is the necessary corollary to its prompt use in appropriate cases. Whether a particular case is appropriate, legally and otherwise, calls for hard judgment and frequently complex financial and regulatory determinations.[69]

The surveillance systems mentioned above have apprised SIPC of hundreds of situations of varying degrees of financial difficulty.[70] Many have been resolved without SIPC's intervention,[71] frequently by merger, acquisition, new capital or self-liquidation (sometimes *via* the sale or transfer of customers' accounts and branch offices to financially sound firms). Illustrative of the last are the well-publicized cases of du Pont Glore Forgan, Inc. and W. E. Hutton & Co.

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[67] This Court's sophistication in insolvency matters makes it unnecessary to dwell upon the broad spectrum of the impact of a Liquidation Proceeding. Some observations, however, seem appropriate. There is, of course, a necessary depletion of SIPC's funds and a consequent advancement of the potential need for United States funds. Obviously, the member itself is extinguished, and the personal assets of proprietors and general partners may be utilized to satisfy creditors. *SEC* v. *Wick*, 360 F. Supp. 313, 316 (N.D. Ill. 1973). The appointment of a trustee automatically makes it unlawful for the firm to do business thereafter, unless the Commission otherwise determines, and it also authorizes the Commission to bar or suspend specified persons "from being or becoming associated with a broker or dealer." Section 10(b), § 78jjj(b). Although the customers of the member are protected as the Act provides, their securities are at market risk until returned to them. And in general, the proceeding affects all creditors of the firm including banks [*e.g., SEC* v. *Morgan Kennedy & Co., Inc.*, [1973-1974 Tranfer Binder] CCH FED. SEC. L. REP. ¶ 94, 568 (S.D.N.Y. 1974)], other brokers or dealers [*e.g., SEC* v. *Packer, Wilbur & Co., Inc.*, 498 F. 2d 978 (2d Cir. 1974)], computer service bureaus [*e.g., SEC* v. *J. Shapiro Co.*, No. 4-73 Civ. 212 (D. Minn., filed March 8, 1974) (Owens, Referee), *aff'd*, No. 4-73 Civ. 212 (D. Minn., filed September 10, 1974), *appeal docketed*, No. 74-1760, 8th Cir., October 16, 1974] and other persons and institutions which customarily deal with broker-dealers such as transfer agents [*e.g., SIPC* v. *Seed Capital Corp.*, 74 Civ. 878 (S.D.N.Y.)] and the clearing corporations of the self-regulatory organizations [*e.g., In re Weis Securities, Inc.*, 73 Civ. 2332 (S.D.N.Y.) and *SEC* v. *Doores Securities Corp.*, 72 Civ. 3640 (S.D.N.Y.)].

[68] *In re Weis Securities, Inc.*, 73 Civ. 2332 (S.D.N.Y.). That proceeding involves approximately 32,000 securities customers, approximately $174,000,000 in customers' cash and securities, approximately $16,500,000 exposure to SIPC's funds, and has affected subordinated lenders (approximately $6,220,000), banks, stock exchange clearing corporations, hundreds of the debtor's employees, and numerous other persons and businesses.

[69] See Guttman, *Broker-Dealer Bankruptcies*, 48 N.Y.U.L. REV. 887, 930-31 (1973); Karmel and Weissman, ***Taking Stock of the Court's Jurisdiction in a SIPA Liquidation***, 41 BKLYN. L. Rev. 1, 17-18 (1974). The instant case is one in which the judgment against a Liquidation Proceeding seemed necessitated by a confluence of several independent factors (SA 39), among which were the clear impossibility of implementing the Act as Congress intended by reason of the practical completion of the liquidating receivership, and the commingling and liquidation of the businesses, assets and affairs of several of Guaranty Bond's affiliates who were not Members of SIPC.

[70] See 3 SIPC ANN. REP. 17 (1973); 2 SIPC ANN. REP. 17-18 (1972); 1 SIPC ANN. REP. 19-21 (1971); 1 SIPC CONF. REP. 25 (1973).

SIPC's Discretion—Exercised At The Highest Level

By vesting SIPC with discretion Congress clearly did not place its customer protection program in the precarious custody of an unsupervised profit-oriented corporation. It reposed its confidence in a *quasi*-public nonprofit corporation (i) whose board of directors (carefully balanced against industry domination)[72] and funds would not be controlled by a voting membership, (ii) whose board chairman and vice-chairman would be directors not recently associated in any way with the securities industry,[73] and (iii) which in any event would remain subject to extraordinary supervisory powers granted to the Commission.

SIPC is not a sprawling bureaucracy. It was intended to be and is a small organization,[74] a result made possible

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[71] As of this writing, SIPC has commenced 113 Liquidation Proceedings, of which 108 resulted in the actual liquidation of the Member. The remaining five cases illustrate another form of prudent restraint. In those SIPC withdrew its application after the Member (in temporary receivership in four cases) found ways to satisfy its obligations to customers. See *McMaster Hutchinson & Co.*, No. 74C2549 (N.D. Ill.); *Cash Shoaf & Company, Inc.*, Civil Action No. 73-C-123-R (W.D. Va); *W. A. Fox & Co.*, Civil Action No. 1238-73 (D. N.J.); *Smith Bros. & Co.*, No. 73C1374 (N.D. Ill.); *Bellis & Co.*, Civil Action File No. MO-73-CA-41 (W.D. Texas).

[72] See 116 Cong. Rec. 43232-33 (1970) (remarks of Mr. Muskie).

[73] Section 3(c)(2)(C)(ii): §78ccc(c)(2)(C)(ii).

[74] At this writing SIPC has a total complement of 44 officers and employees. Cf. 3 SIPC Ann. Rep. 31 (1973).

by the plan of the Act which places the primary responsibility in Liquidation Proceedings upon the trustee, his counsel and other staff. By bylaw[75] (filed with the Commission, as required) the board of directors has reserved the right to decide whether a Liquidation Proceeding is appropriate, except in cases involving a probable exposure to SIPC's funds not in excess of $1,000,000. In the latter cases the discretion is delegated to the chairman of the board. To date SIPC has had two chairmen, both former members of the Commission.[76]

Extraordinary Character Of The Commission's Section 7(b) Remedy

The remedy of enforcement granted to the Commission is in the nature of mandamus or a mandatory injunction. It is plainly supervisory and extraordinary. Not only does it authorize the Commission to seek judicial review of SIPC's discretionary corporate decisions, but it also contemplates the granting of unprecedented relief, *i.e.* a judicial determination compelling SIPC to commence a legal proceeding and commit its funds. Such a grant of authority to the Commission was a logical and necessary extension of the Commission's other equally extraordinary supervisory controls over SIPC (see "Commission Supervision" *supra* at 10). That power was carefully limited to the Commission which has the requisite expertise and authority to review and evaluate SIPC's decisions, as well as the public responsibility of a government agency which assures (i) the necessary balancing of all relevant factors in the public interest, (ii) the confidentiality of potentially damaging information regarding the subject Member, and (iii) a considered rather than precipitious commencement of a far-reaching enforcement action. Understandably section 7(b) grants the Commission discretion as to whether to commence such a potent proceeding.

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[75] Article 7, reprinted at page 16a of the Appendix hereto.

[76] SIPC's first chairman was Byron D. Woodside who was succeeded by Hugh F. Owens, the incumbent.

B. Section 7(b) Was Clearly Intended By Congress To Vest The Commission With The Exclusive Remedy For Enforcement Of SIPC's Responsibilities Under The Act. Under The Applicable Rules Of Statutory Construction As Applied By This Court, The Court of Appeals Erred When It Inferred A Duplicate Private Right of Action.

The basic design and fabric of the Act is evident. The self-regulatory organizations and the Commission were given primary responsibility to upgrade the industry and advise SIPC of failing firms. SIPC was given the primary responsibility to act for the protection of customers *via* a Liquidation Proceeding. Finally, the Commission was assigned to serve as Congress' instrument of substantial continuing supervision over SIPC *via* section 7(b) and other important provisions. The foregoing was well stated in the House Report (at 11-12) under "Commission Oversight". It is highly significant that in creating the section 7(b) enforcement remedy Congress granted it to the Commission and withheld it from the self-regulatory organizations themselves upon whom it placed other important responsibilities under the Act.[77] To urge that Congress tacitly conferred this extraordinary remedy upon the investing public at large, while withholding it from the more appropriate self-regulatory organizations, suggests a legislative sleight of hand for which neither paradox nor anomaly seem sufficiently descriptive terms. Having

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[77] See pages 12, 18-19 *supra*. See also sections 8 and 9, §§78hhh and iii. Similarly, the enforcement remedy was not granted to customers despite Congress' obvious preoccupation with their protection; nor was it granted to receivers or other fiduciaries although Congress specifically recognized that a need for the protection of the Act might appear after the appointment of a receiver, trustee and the like. Section 5(a)(3)(B), §78eee(a)(3)(B).

included the section 7(b) remedy among the Commission's extraordinary supervisory powers, Congress could not have given a clearer signal of exclusivity even if it had gone through the redundant exercise of saying it meant precisely what it did.

The exclusivity of section 7(b) is amply supported, if not required, by the rule of construction *expressio unius est exclusio alterius,* particularly as it has been applied by this Court in *Nat'l R. R. Passenger Corp.* v. *Nat'l Association of R.R. Passengers,* 414 U.S. 453 (1974) ("Amtrak") and *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297 (1943) ("Switchmen's Union").[78] In *Amtrak* this court expressed the rule in very clear and helpful terms, the essence of which was stated thusly:

> "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."[79] (at 458)

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[78] See also *Renegotiation Board* v. *Bannercroft Clothing Co., Inc.*, 415 U. S. 1, 18 (1974); *United States* v. *Babcock*, 250 U.S. 328, 331 (1919); *Ash* v. *Cort*, 496 F.2d 416, 421 (3rd Cir.) (dictum), *cert. granted,* 43 U.S.L.W. 3279 (U. S. November 11, 1974) (73-1908); *Holloway* v. *Bristol-Myers Corp.*, 485 F.2d 986 (D. C. Cir. 1973); *Fort Worth National Corp.* v. *Federal Savings and Loan Ins. Corp.*, 469 F.2d 47, 52, 54 (5th Cir. 1972).

[79] The Court continued: " 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' Botany Worsted Mills v. United States, 278 U. S. 282, 289 (1929). This principal of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius.* Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act. But even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent. Neuberger v. Comm'r, 311 U. S. 83, 88 (1940)." *Id.*

In *Fleischmann Distill. Corp.* v. *Maier Brewing Co.*, 386 U.S. 719 (1967), this Court also cautioned: "When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied." (at 720).

In *Amtrak* this Court reviewed section 307(a) of the Amtrak Act which authorizes the federal district courts, upon petition of the Attorney General, to restrain alleged violations of duty by Amtrak in its administration of the Amtrak Act. As in this case, section 307(a) uses no words of exclusivity and Amtrak was made generally amenable to suit.[80] This Court refused to infer a private right of action to enforce Amtrak's broad statutory responsibilities. Rather it held that the foregoing rule of construction required the conclusion that the Attorney General's remedy is exclusive in the absence of "clear contrary evidence of legislative intent." In language even more appropriate to section 7(b) of the Act this Court concluded:

> "In light of the language and legislative history of §307(a), we read it as creating a public cause of action, maintainable by the Attorney General, to enforce the duties and responsibilities imposed by the Act." (at 457).

In reaching its determination the Court noted with some emphasis that to infer a private right of action would produce results inconsonant with Congress' plan to provide an "efficient apparatus" to carry out the purposes of the Amtrak Act.[81] It also noted (at 464 n. 12) Amtrak's statutory duty to make periodic reports of its operations to the

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[80] 45 U.S.C. § 541; D. C. Code § 29-904(b).

[81] Referring to the line of cases which have inferred a private right of action [citing *J. I. Case* v. *Borak*, 377 U. S. 426 (1964)], this Court emphasized that a private right could not be inferred unless ". . . consistent with the evident legislative intent and . . . the effectuation of the purposes intended to be served by the Act." 414 U. S. at 458.

Congress and the President, a factor which the Court recognized enabled Congress to believe that the exclusive remedy given the Attorney General would be effective.

Amtrak would seem *a fortiori* to require reversal here. The result reached by this Court is even more appropriate in this case in light of the language of section 7(b) and the statutory framework in which it was cast. Some points of comparison which demonstrate *Amtrak's* controlling character are:

1. The Act vests the exclusive enforcement right in a government agency, the Commission, which for forty years has been charged by Congress with the enforcement of the federal securities laws. It includes the section 7(b) remedy among other far-reaching supervisory controls over SIPC. The Attorney General's role under the Amtrak Act is far less pervasive.

2. By reason of its general enforcement activities and the mandate of section 5(a)(1) the Commission is perforce privy to every situation in which SIPC might have a responsibility.[82] The Act forces Commission focus at the threshold of every problem, and its scrutiny of SIPC's determinations follows as a matter of course and statutory duty. The same cannot be said of the Attorney General under the Amtrak Act.

3. Section 7(b) of the Act unambiguously *creates* a cause of action which it vests directly in the Commission. In contrast section 307(a) of the Amtrak Act conferred broad jurisdiction upon the federal courts to enforce Amtrak's breaches of duty "upon petition of the Attorney General." This Court noted: "In terms, §307(a) purports only to confer

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[82] The Commission is obliged to notify SIPC of the possible failure of a broker-dealer, and the self-regulatory organizations must make such reports to the Commission as well as SIPC.

jurisdiction, not to create a cause of action." (at 457). However, it found from the legislative history that the congressional intent "was to authorize certain types of results for the enforcement of the Act's provisions." (*Id.*).

4. Like the Amtrak Act, express words of exclusivity do not appear in section 7(b), and SIPC's general amenability to suit is, of course, included among its enumerated broad corporate powers. The reliance of the Court of Appeals solely on these two factors was surely misplaced.
5. Unlike Amtrak, SIPC is a non-profit corporation. The profit motive can never obscure its public vision.

Other important comparisons can be made.[83]

When considered in the context of the Act, section 7(b) leads to the conclusion of exclusivity for more compelling reasons than existed in the *Amtrak* case. It should be observed that the factors which influenced Mr. Justice Douglas' dissent in *Amtrak* do not appear under the Act,

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[83] Section 307(a) of the Amtrak Act conferred jurisdiction upon "the district court . . . for any district in which the Corporation or other person resides or may be found. . . ." Section 7(b) of the Act requires the Commission to sue in the district court where SIPC's principal office is located. Designed for SIPC's convenience, this provision further negates a congressional intent to imply a private right of action which might be brought anywhere if jurisdictional bases existed.

Section 7(b) of the Act is entitled "Enforcement of Actions," and section 7 (of which it is part) is entitled "SEC Functions." There is no comparable indicator of exclusivity in section 307(a) of the Amtrak Act.

SIPC's board of seven includes two representatives of the federal government (see page 10, *supra*). Amtrak's board of seventeen includes only one. 45 U.S.C. §543(a)(1).

Like Amtrak SIPC's annual reports of operations are transmitted to the President and Congress. Moreover, they are accompanied by the Commission's comments.

and that the grounds upon which he distinguished *Switchmen's Union* do not obtain.

Although involving a statutory scheme not as analogous as *Amtrak,* the *Switchmen's Union* case also seems controlling in principle. There the Railway Labor Act had empowered the National Mediation Board to issue certificates of representation for collective bargaining. A union aggrieved by the Board's certification of another union sought judicial review. The statute did not expressly authorize the suit, but the right to review was said to arise by implication from 28 U.S.C. §41(8) granting federal district courts jurisdiction over suits arising under laws regulating commerce. This Court refused to find such an implied right stating, in part (Douglas J.):

> "A review by the federal district courts of the Board's determination is not necessary to preserve or protect that 'right'. Congress for reasons of its own decided upon the method created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. Whether the imposition of judicial review on top of the Mediation Board's administrative determination would strenghthen that protection is a considerable question. All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. . . . In such a case the specification of one remedy normally excludes another." 320 U.S. at 301.

Thus *Switchmen's Union* recognized that Congress may altogether preclude judicial review of an administrative determination. The question here does not go that far. Judicial review is expressly authorized upon the petition of the Commission.

As this Court held in *Amtrak, Switchmen's Union* and numerous other cases, the operative rule of construction must yield to "clear contrary evidence of legislative intent." (414 U.S. at 458). There is none here. Quite the contrary, the application of the rule is necessary to effectuate the legislative intent. That the Congress looked solely to the Commission as SIPC's overseer and enforcer is clear beyond cavil from the overall plan of the statute and the legislative history which includes the specific congressional intent that the Commission's supervision would be the only qualification upon SIPC's participation in the self-regulatory concept which Congress reaffirmed in adopting the Act.[84] The direct expressions concerning section 7(b) in the legislative history are few. However, they support the conclusion of exclusivity.[85]

In reaching its determination in *Amtrak* this Court noted the impediments which the allowance of a private suit would place in the path of the proper implementation of that statute. It would seem from all the foregoing that in adopting the Act Congress so clearly manifested its intent that the ineluctable conclusion of exclusivity, buttressed by the operative rule of construction, need not borrow support from the hazards of a contrary conclusion. Nevertheless, they exist with a potential for harm keenly to be avoided. To grant the enforcement remedy to anyone with requisite standing could clearly subvert the statutory apparatus and the balancing of public interests which Congress sought to achieve. To proliferate the Commission's remedy, entrusted to its sound discretion, would create a situation pregnant with far more hazards, not susceptible of precise forecasting, than any benefit likely to result. Illustrations readily appear.[86] To extend the remedy to private litigants would place them in *pari causa* with the Commission without comparable compensating public responsibilities, thereby superimposing a volatile additional layer of extraordinary supervision upon a delicate statutory mechanism. All things considered, including the unique character, purpose and effect of the enforcement remedy, it is hardly a right which the Congress would have implied or left to inference or conjecture. It plainly did not.

It is respectfully submitted that the question here presented was correctly decided in *Bohart-McCaslin Ventures, Inc.* v. *Midwestern Securities Corp.*, 352 F. Supp. 937 (N.D. Tex. 1973), and that the reasons given by the Court of Appeals for allowing a private enforcement remedy do not survive the *Amtrak* holding or the foregoing analysis.

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[84] House Report at 11-12.

[85] See House Report at 22 and Senate Report at 15. It was the Commission which introduced the concept of "enforcement" in the legislative process, a fact further indicating that the remedy was intended solely for the Commission. The Act evolved from a bill prepared jointly by the Commission and representatives of the securities industry. Each had previously submitted separate bills. The bill submitted by the industry contained no provision for an enforcement action by the Commission or anyone (House Hearings at 57). The Commission's bills provided for enforcement by the Commission in a section which also granted the Commission the power to approve SIPC's bylaws (House Hearings at 35, 53).

[86] The commencement of a private enforcement action could well interfere with the ongoing consideration of a Member's difficulties by the self-regulatory organization, the Commission and SIPC; could frustrate important efforts to find viable alternatives to liguidation (discussed at pages 20-22, *supra*); could start a fatal run on a Member in fragile but not terminal financial difficulty; and might involve a firm, perhaps in marginal financial circumstances, in the defense of a suit or at least a burdensome involvement in an action against SIPC. It is not difficult to see why the Congress committed the enforcement remedy to the Commission's discretion rather than lay the way open for serious hazards at the instance of strangers to the self-regulatory mechanism—persons not in a position to know whether some of the specified statutory conditions exist, whether the sign of financial difficulty they detect truly involves a danger to a Member's customers within the meaning of the Act, and worse to persons whose motives may be malevolent.

II

If it be assumed, *arguendo,* that customers (as defined in the Act) are possessed of an enforcement right despite Section 7(b), nevertheless a receiver lacks standing to assert that right on their behalf under controlling decisions of this Court.

Assuming, *arguendo,* that customers (as defined in the Act) of a SIPC Member are entitled to maintain an enforcement action against SIPC, whether a federal equity receiver has standing to maintain such an action as their representative is a question which seems dispositively answered in the negative by this Court's decisions in *Caplin* v. *Marine Midland Trust Co. of N. Y.*, 406 U.S. 416 (1972) and *McCandless* v. *Furlaud,* 296 U.S. 140 (1935). See also *Clarke* v. *Chase National Bank,* 143 F.2d 797 (2d Cir. 1943).

In *Caplin* a Chapter X trustee, claiming on behalf of the debtor's debenture holders, sued the indenture trustee for its failure to enforce certain negative covenants against the debtor as required by the Trust Indenture Act of 1939. In defense of his representative standing the trustee relied heavily upon the powers of a federal equity receiver which 11 U.S.C. § 587 confers on a Chapter X trustee.[87] Citing the *Clarke* case, *supra,* with approval, this Court held that absent congressional action the trustee's historic role of conserving and marshalling the debtor's assets could not be expanded to authorize suits against third parties involving rights solely of creditors. After turning aside the trustee's urgings that he was "in a far better position than debt investors" to discover the facts and prosecute claims (at 426-7), and that granting him standing would not "unduly deplete the resources of the debtor" since he already had a "duty of investigation" (at 428), this Court emphasized its holding thusly:

> "But as pointed out in the text, *supra,* petitioner only has authority to pursue claims belonging to the estate." (at 432 n. 22)

The trustee had relied on the *McCandless* case, *supra,* "to support the proposition that a receiver in equity may sue third parties on behalf of bondholders." (at 429). This Court pointedly countered:

> "But, the opinion of the Court by Mr. Justice Cardozo clearly emphasizes that the receiver in the case was suing on behalf of the corporation not third parties; he was simply stating the same claim that the corporation could have made had it brought suit prior to entering receivership. *The debtor corporation makes no such claim in this case.* See generally 2 R. Clark, Law and Practice of Receivers § 362, at 619 (3d ed. 1959)." (at 429) (emphasis added).

This Court's decisions in *Caplin* and *McCandless*[88] apply the long established rule that a receiver stands in the shoes of the debtor and does not, by operation of law, succeed as an assignee to the personal rights of creditors of the debtor against third parties.

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[87] In pertinent part that section provides that the trustee, if authorized by the Court, ". . . shall have and may exercise such additional rights and powers as a receiver in equity would have if appointed by a court of the United States *for the property of the debtor.*" (Emphasis added).

[88] In *McCandless* the majority and dissenting justices disagreed upon the facts, but they unanimously applied the settled rule ". . . that a suit by the receiver must be in the right of the corporation, and that the most he can claim is what the corporation could claim: . . . ." (at 175, Roberts, J., dissenting).

Clearly, this Receiver's proceeding does not involve the assertion of Guaranty Bond's rights. It is a representational effort for the ostensible benefit of a special class of Guaranty Bond's creditors, namely, its customers. If successful it would not enhance the estate. Not only would SIPC's funds be advanced for the sole benefit of "protected customers", but the aggregate claims against the estate would remain the same by virtue of SIPC's subrogation rights (discussed *supra* at 16)—a factor similar to that considered relevant in *Caplin* (at 430-31).

This Court declined in *Caplin* to expand the powers of an equity receiver for the benefit of a Chapter X trustee in order to effectuate the purpose of the Trust Indenture Act of 1939 which ". . . had protection of public investors in mind" (at 422). Neither should they be expanded here because the Act, by a different means, seeks the same broad objective. The question is not whether a particular federal statute shall be enforced, but rather who is the proper party to do so. This discussion assumes, *arguendo*, that customers share the enforcement right with the Commission. The hypothetical premise therefore is that SIPC has a duty which both the Commission and customers may enforce. In that context, less reason appears for expanding the traditional role of a receiver than appeared in *Caplin, McCandless* or *Clarke, supra.* If such expansion is to be written into the law, as this Court said in *Caplin,* it should be by the hand of Congress.

In sustaining the standing of the Receiver the Court of Appeals relied upon criteria for standing evolved by this Court in cases involving review of governmental action at the instance of citizens and taxpayers. See, *e.g., Sierra Club* v. *Morton,* 405 U.S. 727 (1971). Such decisions seem clearly inapplicable to the question here which relates to

the traditional powers and authority of federal equity receivers. Further discussion seems unnecessary unless the Receiver elects to pursue the *Sierra Club* line of cases.

Conclusion

For the foregoing reasons, the petitioner respectfully submits that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

Section 5 §78eee. Protection of customers

(a) *Determination of need of protection.*—

(1) *Notice to SIPC.*—If the Commission or any self-regulatory organization is aware of facts which lead it to believe that any broker or dealer subject to its regulation is in or is approaching financial difficulty, it shall immediately notify SIPC, and, if such notification is by a self-regulatory organization, the Commission.

(2) *Action by SIPC.*—If SIPC determines that any member has failed or is in danger of failing to meet its obligations to customers and that there exists one or more of the conditions specified in subsection (b) (1) (A) of this section, SIPC, upon notice to such member, may apply to any court of competent jurisdiction specified in section 78aa or 78u(e) of this title for a decree adjudicating that customers of such member are in need of the protection provided by this chapter.

(3) *Effect of other pending actions.*—An application under paragraph (2)—

(A) with the consent of the Commission, may be combined with any action brought by the Commission including an action by it for a temporary receiver pending an appointment of a trustee under subsection (b) (3) of this section, and

(B) may be filed notwithstanding the pendency in the same or any other court of any bankruptcy, mortgage foreclosure, or equity receivership proceeding or any proceeding to reorganize, conserve, or liquidate such member or its property, or any proceeding to enforce a lien against property of such member.

(b) *Court action.*—

(1) *Issuance of decree.*—

(A) *Findings by court.*—A court to which application is made pursuant to subsection (a) (2) of this section shall grant the application and issue a decree adjudicating that customers of the member named in the application are in need of protection under this chapter if it finds that such member—

(i) is insolvent within the meaning of section 1(19) of Title 11, or is unable to meet its obligations as they mature, or

(ii) has committed an act of bankruptcy within the meaning of section 21 of Title 11, or

(iii) is the subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such member has been appointed, or

(iv) is not in compliance with applicable requirements under the 1934 Act or rules or regulations of the Commission or any self-regulatory organization with respect to financial responsibility or hypothecation of customers' securities, or

(v) is unable to make such computations as may be necessary to establish compliance with such financial responsibility or hypothecation rules or regulations.

(B) *Uncontested, etc., applications.*—If within three business days after the filing of an application pursuant to subsection (a) (2) of this section, or such other period as the court may order, the debtor shall consent to or fail to contest such application or shall fail to show facts sufficient to contorvert (sic) any material allegation of such application, the court shall forthwith grant the application and issue a decree adjudicating that customers of the member named in the application are in need of protection under this chapter.

(2) *Exclusive jurisdiction over debtor.*—Upon the filing of an application pursuant to subsection (a) (2) of this section, the court to which application is made shall have exclusive jurisdiction of the debtor involved and its property wherever located with the powers, to the extent consistent with the purposes of this chapter, of a court of bankruptcy and of a court in a proceeding under chapter X of the Bankruptcy Act. Pending an adjudication under paragraph (1) such court shall stay, and upon appointment by it of a trustee as provided in paragraph (3) such court shall continue the stay of, any pending bankruptcy, mortgage foreclosure, equity receivership, or other proceeding to reorganize, conserve, or liquidate the debtor or its property and any other suit against any receiver, conservator, or trustee of the debtor or its property. Pending such adjudication and upon the appointment by it of such trustee, the court may stay any proceeding to enforce a lien against property of the debtor or any other suit against the debtor. Pending such adjudication, such court may appoint a temporary receiver.

(3) *Appointment of trustee.*—If the court grants an application and makes an adjudication under paragraph (1), the court shall forthwith appoint as trustee for the liquidation of the business of the debtor in accordance with section 6, and as attorney for such trustee, such persons as SIPC shall specify. No person shall be appointed as such trustee or attorney if such person is not "disinterested" within the meaning of section 558 of Title 11.

(4) *Debtor and filing date defined.*—For purposes of this chapter—

(A) *Debtor.*—The term "debtor" means a member of SIPC in respect of whom an application has been filed pursuant to subsection (a) (2) of this section.

(B) *Filing date.*—The term "filing date" means the date on which an application with respect to any debtor is filed under subsection (a) (2) of this section; except that if—

(i) a petition was filed before such date by or against the debtor under the Bankruptcy Act, or

(ii) the debtor is the subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such debtor was appointed which proceeding was commenced before the date on which such application was filed,

then the term "filing date" means the date on which such petition was filed or such proceeding commenced.

(c) *SEC participation in proceedings.*—The Commission may, on its own motion, file notice of its appearance in any proceeding under this chapter and may thereafter participate as a party.

Section 6 § 78fff. Liquidation proceedings

(a) *General purposes of liquidation proceeding.*—The purposes of any proceeding in which a trustee has been appointed under section 78eee(b) (3) of this title (hereafter in this section referred to as a "liquidation proceeding") shall be:

(1) as promptly as possible after such appointment and in accordance with the provisions of this section—

(A) to return specifically identifiable property to the customers of the debtor entitled thereto;

(B) to distribute the single and separate fund, and (in advance thereof or concurrently therewith) pay to customers moneys advanced by SIPC, as provided in subsection (f) of this section;

(2) to operate the business of the debtor in order to complete open contractual commitments of the debtor pursuant to subsection (d) of this section;

(3) to enforce rights of subrogation as provided in this chapter; and

(4) to liquidate the business of the debtor.

(b) *Powers and Duties of Trustee.*—

(1) *Trustee powers.*—A trustee appointed under section 78eee(b) (3) of this title (hereinafter referred to as "trustee") shall be vested with the same powers and title with respect to the debtor and the property of the debtor, and the same rights to avoid preferences, as a trustee in bankruptcy and a trustee under chapter X of the Bankruptcy Act have with respect to a bankrupt and a chapter X debtor. In addition, a trustee shall have the right—

(A) with the approval of SIPC, to hire and fix the compensation of all personnel (including officers and employees of the debtor and of its examining authority) and other persons (including but not limited to accountants) that are deemed by such trustee necessary for all or any purposes of the liquidation proceeding, and

(B) to operate the business of the debtor in order to complete open contractual commitments pursuant to subsection (d) of this section,

and no approval of the court shall be required therefor.

(2) *Trustee duties.*—Except as inconsistent with the provisions of this chapter or otherwise ordered by the court, a trustee shall be subject to the same duties as a trustee appointed under section 72 of

Title 11, except that a trustee may, but shall have no duty to, reduce to money any securities in the single and separate fund (provided under subsection (c) (2) (B) of this section) or in the general estate of the debtor.

(c) *Application of Bankruptcy Act.—*

(1) *General provisions applicable.*—Except as inconsistent with the provisions of this chapter and except that in no event shall a plan of reorganization be formulated, a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under, the provisions of chapter X and such of the provisions (other than section 96(e) of Title 11) of chapters I to VII, inclusive, of the Bankruptcy Act as section 502 of Title 11 would make applicable if an order of the court had been entered directing that bankruptcy be proceeded with pursuant to the provisions of such chapters I to VII, inclusive; except that the court may, for such period as may be appropriate, stay enforcement of, but shall not abrogate, the rights provided in section 108 of Title 11 and the right to enforce a valid, nonpreferential lien or pledge against the property of the debtor. For purposes of applying the Bankruptcy Act in carrying out this section, any reference in the Bankruptcy Act to the date of commencement of proceedings under the Bankruptcy Act shall be deemed to be a reference to the filing date (as defined in section 78eee(b) (4) (B) of this title).

(2) *Special provisions.*—The following subparagraphs of this paragraph shall apply to a liquidation proceeding in lieu of section 96(e) of Title 11:

(A) *Definitions.*—Except as otherwise expressly provided in this section, for purposes of this section and the application of the Bankruptcy Act to a liquidation proceeding—

(i) "property" includes cash and securities, whether or not negotiable and all property of a similar character;

(ii) "customers" of a debtor means persons (including persons with whom the debtor deals as principal or agent) who have claims on account of securities received, acquired, or held by the debtor from or for the account of such persons (I) for safekeeping, or (II) with a view to sale, or (III) to cover consummated sales, or (IV) pursuant to purchases, or (V) as collateral security, or (VI) by way of loans of securities by such persons to the debtor, and shall include persons who have claims against the debtor arising out of sales or conversions of such securities, and shall include any person who has deposited cash with the debtor for the purpose of purchasing securities, but shall not include any person to the extent that such person has a claim for property which by contract, agreement, or understanding, or by operation of law, is part of the capital of the debtor or is subordinated to the claims of creditors of the debtor;

(iii) "cash customer" means, with respect to any securities or cash, customers entitled to immediate possession of such securities or cash without the payment of any sum to the debtor, and for purposes of this clause, the same person may be a cash customer with reference to certain securities or cash and not a cash customer with reference to other securities or cash;

(iv) "net equity" of a customer's account or accounts means the dollar amount thereof determined by giving effect to open contractual commitments completed as provided in subsection (d) of this section, by excluding any specifically identifiable property reclaimable by the customer, and by subtracting the indebtedness, if any, of the customer to the debtor from the sum which would have been owing by the debtor to the customer had the debtor liquidated, by sale or purchase on the filing date, all other securities and contractual commitments of the customer, and for purposes of this definition, accounts held by a customer in separate capacities shall be deemed to be accounts of separate customers; and

(v) "securities" has the same meaning as such term has under section 96(e) of Title 11.

(B) *Single and separate fund.*—All property at any time received, acquired, or held by or for the account of the debtor from or for the account of customers except cash customers who are able to identify specifically their property in the manner prescribed in subparagaph (C), and the proceeds of all customers' property transferred by the debtor, including property unlawfully converted, shall constitute a single and separate fund; and all customers except such cash customers shall constitute a single and separate class of creditors, entitled to share ratably in such fund on the basis of their respective net equities as of the filing date and in priority to all other payments, except that (i) there shall be repaid to SIPC, in priority to all other claims payable from such single and separate fund, the amount of all advances made by SIPC to the trustee to permit the completion of open contractual commitments pursuant to subsection (d) of this section, and (ii) to the extent that any other assets of the debtor may be available therefor as otherwise ordered by the court, all costs and expenses specified in clauses (1) and (2) of section 104(a) of Title 11 shall be paid from such single and separate fund in priority to the claims of such single and separate class of creditors, and any moneys advanced by SIPC for such costs and expenses shall be recouped as such. If such single and separate fund shall not be sufficient to pay in full the claims of such single and separate class of creditors, the creditors of such class shall be entitled, to the extent only of their respective unpaid balances, to share in the general estate with general creditors. In, or for the purpose of, distributing such fund, all property other than cash shall be valued as of the close of business on the filing date. To the greatest extent considered practicable by the trustee, the trustee shall deliver in payment of claims of customers for their net equities based upon securities held on the filing date in their accounts (after giving effect to open contractual commitments completed as hereinafter provided), securities of the same class and series of an issuer ratably up to the respective amounts which were so held in such accounts. Any property remaining after the liquidation of a lien or pledge made by a debtor shall be apportioned between his general estate and the single and separate fund in the proportion in which the general property of the debtor and the property of his customers contributed to such lien or pledge.

(C) *Specifically identifiable property.*—The trustee shall return specifically identifiable property to the customers of the debtor, entitled thereto. No cash or securities at any time received, acquired, or held by or for the account of a debtor from or for the accounts of customers shall for the purposes of this paragraph be deemed to be specifically identified, unless such property remained in its identical form in the debtor's possession until the filing date, or unless such property was allocated to or physically set aside for such customers on the filing date. In determining whether property was allocated to or physically set aside for such customers, it shall be sufficient that on the filing date:

(i) securities are segregated individually, or in bulk for customers collectively;

(ii) in the case of securities held for the account of the debtor as part of any central certificate service of any clearing corporation or any similar depositary—

(I) the records of the debtor show or there is otherwise established to the satisfaction of the trustee that all or a specified part of the securities held by such clearing corporation or other similar depositary are held for specified customers, or for customers collectively, and

(II) such records of the debtor also show or there is otherwise established to the satisfaction of the trustee the identities of the particular customers entitled to receive specified numbers or units of such securities so held for customers collectively; or

(iii) such property is held for the account of customers of the debtor in such other manner as the Commission, for the protection of customers and other creditors on a fair and equitable basis, by rule or regulation shall have determined to be sufficiently identifiable as the property of such customers.

If there is any shortage in securities of the same class and series of an issuer so segregated in bulk or otherwise held for customers pursuant to this subparagraph, as compared to the aggregate rights of particular customers to receive securities of such class and series, the respective interests of such customers in such securities of such class and series shall be prorated, without prejudice, however, to the satisfaction of any claim for deficiencies as otherwise provided in this section.

(D) Where such single and separate fund is not sufficient to pay in full the claims of such single and separate class of creditors, a transfer by a debtor of any property which, except for such transfer, would have been a part of such fund may be recovered by the trustee for the benefit of such fund, if such transfer is voidable or void under the provisions of the Bankruptcy Act. For the purpose of such recovery, the property so transferred shall be deemed to have been the property of the debtor and, if such transfer was made to a customer or for his benefit, such customer shall be deemed to have been a creditor, the laws of any State to the contrary notwithstanding. Subject to the provisions of paragraph (D), if any securities received or acquired by a debtor from a cash customer are transferred by the debtor, such customer shall not have any specific interest in or specific right to any securities of like kind on hand on the filing date, but such securities of like kind or the proceeds thereof shall become part of such single and separate fund.

(d) *Completion of open contractural (sic) commitments.* —The trustee shall complete those contractual commitments of the debtor relating to transactions in securities which were made in the ordinary course of debtor's business and which were outstanding on the filing date—

(1) in which a customer had an interest, except those commitments the completion of which the Commission shall have determined by rule or regulation not to be in the public interest, or

(2) in which a customer did not have an interest, to the extent that the Commission shall by rule or regulation have determined the completion of such commitments to be in the public interest.

For purposes of this subsection (but not for any other purpose of this chapter) (i) the term "customer" means any person other than a broker or dealer, and (ii) a customer shall be deemed to have had an interest in a transaction if a broker participating in the transaction was acting as agent for a customer, or if a dealer participating in the transaction held a customer's order which was to be executed as a part of the transaction. All property at any time received, acquired, or held by or for the account of the debtor (except for cash or securities that are specifically identifiable as the property of particular customers and are not the subject of an open contractual commitment), and all property in the single and separate funds shall be available to complete open contractual commitments pursuant to this subsection. Securities purchased or cash received by the trustee upon completion of any such commitment shall constitute specifically identifiable property of a customer to the extent that such commitment was completed with property which constituted specifically identifiable property of such customer on the filing date, or was paid or delivered by or for the account of such customer to the debtor or the trustee after the filing date.

(e) *Notice.*—Promptly after his appointment, the trustee shall cause notice of the commencement of proceedings under this section to be published in accordance with a designation of the court, made in accordance with the requirements of section 51 of Title 11, and at the same time shall cause to be mailed a copy of such notice to each of the customers of the debtor as their addresses shall appear from the debtor's books and records. Except as the trustee may otherwise permit, claims for specifically identifiable property (other than securities registered in the name of the claimant or segregated for him in his individual name) or claims payable from property in the single and separate fund or payable with moneys advanced by SIPC, shall not be paid other than from the general estate of the debtor unless filed within such period of time (not exceeding sixty days after such publication) as may be fixed by the court, and no claim shall be allowed after the time specified in section 93 of Title 11. Subject to the foregoing, and without limiting the powers and duties of the trustee to discharge promptly obligations as specified in this section, the court may make appropriate provision for proof and

enforcement of all claims against the debtor including those of any subrogee.

(f) *SIPC Advances to Trustee.*—

(1) *Advances for customers' claims.*—In order to provide for prompt payment and satisfaction of the net equities of customers of debtor, SIPC shall advance to the trustee such moneys as may be required to pay or otherwise satisfy claims in full of each customer, but not to exceed $50,000 for such customer; except that—

(A) insofar as all or any portion of the net equity of a customer is a claim for cash, as distinct from securities, the amount advanced by reason of such claim to cash shall not exceed $20,000;

(B) a customer who holds accounts with the debtor in separate capacities shall be deemed to be a different customer in each capacity;

(C) no such advance shall be made by SIPC to the trustee to pay or otherwise satisfy, directly or indirectly, any claims of any customer who is a general partner, officer, or director of the debtor, the beneficial owner of 5 per centum or more of any class of equity security of the debtor (other than a non-convertible stock having fixed preferential dividend and liquidation rights) or limited partner with a participation of 5 per centum or more in the net assets or net profits of the debtor; and

(D) no such advance shall be made by SIPC to the trustee to pay or otherwise satisfy claims of any customer who is a broker or dealer or bank other than to the extent that it shall be established to the satisfaction of the trustee, from the books and records of the debtor or from the books and records of a broker or dealer or bank or otherwise, that claims of such broker or dealer or bank against the debtor arise out of transactions for customers of such broker or dealer or bank, in which event, each such customer of such broker or dealer or bank shall be deemed a separate customer of the debtor.

To the extent that moneys are advanced by SIPC to the trustee to pay the claims of customers, SIPC shall be subrogated to the claims of such customers with rights and priorities provided in this section.

(2) *Other advances.*—SIPC may advance to the trustee such moneys as may be required to effectuate subsection (b) (1) (A) of this section. SIPC shall advance to the trustee such moneys as (with those available pursuant to subsection (d) of this section) may be required to effectuate subsection (d) of this section.

(g) *Payments to customers; no proof of claim required.*—It shall be the duty of the trustee to discharge promptly, in accordance with the provisions of this section, all obligations of the debtor to each of its customers relating to, or net equities based upon, securities or cash by the delivery of securities or the effecting of payments to such customer (subject to subsection (f) (1) of this section, to the extent that such payments are made out of advances from SIPC under such subsection) insofar as such obligations are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee, whether or not such customer shall have filed formal proof of such claim. For that purpose the court among other things shall—

(1) in respect of claims relating to securities or cash, authorize the trustee to make payment out of moneys made available to the trustee by SIPC notwithstanding the fact that there shall not have been any showing or determination that there are sufficient funds of the debtor available to make such payment; and

(2) in respect of claims relating to, or net equities based upon, securities of a class and series of an issuer, which are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee, authorize the trustee to deliver securities of such class and series if and to the extent available to satisfy such claims in whole or in part, with partial deliveries to be made pro rata to the greatest extent considered practicable by the trustee.

Any payment or delivery of property pursuant to this subsection may be conditioned upon the trustee requiring claimants to execute in a form to be determined by the trustee, appropriate receipts, supporting affidavits, and assignments, but shall be without prejudice to the right of any claimant to file formal proof of claim within the period specified in subsection (e) of this section for any balance of securities or cash to which he may deem himself entitled.

(h) *Proof of claim by associates and others.*—The provisions of this section permitting discharge of obligations of the debtor to pay cash or to deliver securities without formal proof of claim shall not apply to any person "associated" with the debtor as defined in section 78c(a) (18) of this title, to any beneficial owner of 5 per centum or more of the voting stock of the debtor, or to any member of the immediate family of any of the foregoing.

(i) *Reports by trustee to court.*—All reports to the court by a trustee (other than reports required to be filed pursuant to section 567(3) of Title 11) shall be in such form and detail as, having due regard to the requirements of section 78q of this title and the rules and regulations thereunder and the magnitude of items and transactions involved in connection with the operations of a broker or dealer, the Commission shall determine by rules and regulations to present fairly the results of such proceeding as at the dates or for the periods covered by such reports.

(j) *Effect of chapter on claims.*—Except as otherwise provided in this section, nothing in this section shall limit the right of any person to establish by formal proof such claims as such person may have to payment, or to delivery of specific securities without resort to moneys advanced by SIPC to the trustee.

* * * * *

[Bylaw of Securities Investor Protection Corporation]

ARTICLE 7

Liquidation

Section 1. *Application for Adjudication.*

(a) Except as provided in subsections (b) or (c), no application shall be made for an adjudication under Section 5(a)(2) of the Act except upon direction of the Board.

(b) The Chairman is authorized, in his discretion, to file an application for adjudication on behalf of the Board in respect to any member broker or dealer where:

> (1) The Chairman has determined on the basis of the information then available, that the member broker or dealer has failed or is in danger of failing to meet its obligations to customers, and
>
> (2) The Chairman has determined, on the basis of the information then available, that the amount of SIPC funds required to meet the obligations of the member broker or dealer to its customers does not exceed $1,000,000.00.

(c) The Chairman is authorized, in his discretion, to file an application for adjudication on behalf of the Board in respect to any member broker or dealer where:

> (1) The Chairman has determined, on the basis of the information then available, that the member broker or dealer has failed or is in danger of failing to meet its obligations to customers, and
>
> (2) The Chairman has determined, on the basis of the information then available, that the public interest requires action by this Corporation before a special or regular meeting of the Board can reasonably be held, and
>
> (3) The Chairman has obtained by telephone or otherwise agreement to such action by a majority of the Directors.

Section 2. *Appointment of Trustees and Attorneys.*

In the event of an application for an adjudication under Section 5(b)(1) of the Act, the Board shall specify the persons to be appointed by the court as trustee, and as attorney for such trustee, for the liquidation of a member, suant to Section 5(b)(3) of the Act. In the event the Chairman has acted pursuant to delegated authority to file an application for such adjudication, the Chairman may specify the persons to be so appointed by the court.

Supreme Court, U. S.
FILED
DEC 26 1974
MICHAEL RODAK, JR., CLE

No. 73-2055

In the Supreme Court of the United States

OCTOBER TERM, 1974

SECURITIES INVESTOR PROTECTION CORPORATION,
PETITIONER

v.

JAMES C. BARBOUR, AS RECEIVER FOR GUARANTY BOND AND SECURITIES CORPORATION AND GUARANTY BOND COMPANY, INC., AND SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2055

SECURITIES INVESTOR PROTECTION CORPORATION,
PETITIONER

v.

JAMES C. BARBOUR, AS RECEIVER FOR GUARANTY BOND AND SECURITIES CORPORATION AND GUARANTY BOND COMPANY, INC., AND SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (App. 80)[1] is reported at 496 F. 2d 145. The opinion of the district court (App. 72) is unreported.

JURISDICTION

The judgment of the court of appeals (App. 90) was entered on April 23, 1974. The petition for a writ of certiorari was filed on July 20, 1974, and was granted on October 21, 1974 (App. 92). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

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[1] "App." refers to the joint appendix filed in this case.

QUESTION PRESENTED

The Commission will discuss only the first question on which certiorari was granted (see note 2, *infra*):

1. Whether customers of a member have an implied private right of action to compel the Securities Investor Protection Corporation ("SIPC") to meet its alleged obligation to them under the Securities Investor Protection Act of 1970 ("SIPA" or "the Act"), despite Section 7(b) thereof which grants that right only to the Securities and Exchange Commission.

STATUTES INVOLVED

Section 7(b) of the Securities Investor Protection Act of 1970, 84 Stat. 1653, 15 U.S.C. 78ggg(b), provides:

> In the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member of SIPC, the Commission may apply to the district court of the United States in which the principal office of SIPC is located for an order requiring SIPC to discharge its obligations under this chapter and for such other relief as the court may deem appropriate to carry out the purposes of this chapter.

Other provisions of the Act, 5 U.S.C. 78eee, *et seq.*, are set forth in the Appendix to Petitioner's brief.

STATEMENT

The Securities Investor Protection Corporation is a non-profit membership corporation whose members include all persons registered as brokers or dealers under the Securities Exchange Act of 1934 (Section 3(a) of the Securities Investor Protection Act of 1970, 15 U.S.C. 78ccc(a)). It was created by the Securities Investor Protection Act of 1970 to provide greater protection to the customers of members. S. Rep. No. 1218, 91st Cong., 2d Sess., pp. 1–4; H. Rep. No. 1613, 91st Cong., 2d Sess., p. 1–4. Under the Act, SIPC may apply to a court for a decree initiating liquidation proceedings if it determines that a member has failed or is in danger of failing to meet its obligatons to its customers and that one or more specified conditions indicating financial difficulty exist (15 U.S.C. 78eee(a)(2) and (b)(1)). If the application is granted, SIPC is obligated, if necessary, to advance moneys to meet certain customer claims from a fund established and maintained by required contributions from its members (15 U.S.C. 78 fff(f)). Should the fund become insufficient for the purposes of the Act, the Securities and Exchange Commission is authorized to make loans to SIPC and to borrow from and issue notes for this purpose to the Secretary of the Treasury in an aggregate amount not to exceed $1,000,000,000 (15 U.S.C. 78ddd(g) and (h)).

The Securities and Exchange Commission is also given certain supervisory authority over SIPC, and it is specifically authorized to apply to a district court for an order requiring SIPC to discharge its obligations under the Act (15 U.S.C. 78ggg).

From June 20, 1962, until after the effective date of the Securities Investor Protection Act on December 30, 1970, Guaranty Bond and Securities Corporation ("Guaranty Bond") was a broker-dealer registered with the Securities and Exchange Commission pursuant to Section 15(b) of the Securities Exchange Act of 1934, 48 Stat. 895, as amended, 15 U.S.C. 78*o*(b) (App., p. 2). On December 22, 1970, the Commission filed a complaint and moved for a preliminary injunction against Guaranty Bond, alleging, *inter alia*, that Guaranty Bond was and had been in violation of the Commission's "net capital rule" (17 C.F.R. 240.15c3-1) (App., p. 1).

On January 6, 1971, the district court found that Guaranty Bond had been in violation of the net capital rule for a substantial period of time prior to the filing of the complaint and issued a preliminary injunction against further violations (App., pp. 41–53). On January 29, 1971, on the Commission's motion, the court appointed a receiver for Guaranty Bond (App., pp. 54–59).

On March 31, 1972, after the receiver had substantially completed the liquidation of Guaranty Bond, he filed a petition with the district court in the Commission's injunction action asking that SIPC and the Commission be ordered to show cause why SIPC should not be required to intervene in the action and extend the protection of the Act to the customers of the brokerage firm (App., pp. 19–27). The district court issued the requested order and subsequently filed a Memorandum Opinion (App., pp. 72–78) in which it held: (1) The receiver could maintain an action against SIPC on behalf of the customers of Guaranty Bond (App., pp. 75–76), but (2) the customers of the firm were not entitled to protection under the Act because the evidence demonstrated that the firm was "hopelessly insolvent" prior to the effective date of the Act, and "to grant the requested relief would be a retroactive application of the Act and a clear frustration of legislative intent" (App., pp. 76–78).

The court of appeals agreed with the district court that the receiver had standing to bring an action seeking the customer protections provided under the Act (App., pp. 88–89). It reversed the determination that Guaranty Bond's customers were not entitled to protection under the Act, however, because of the substantial business Guaranty Bond had conducted after the effective date of the Act (App., pp. 86–87)—a fact that was disputed below.

ARGUMENT

THE STATUTORY AUTHORITY OF THE SECURITIES AND EXCHANGE COMMISSION TO INSTITUTE AN ACTION TO COMPEL THE SECURITIES INVESTOR PROTECTION CORPORATION TO DISCHARGE ITS OBLIGATIONS UNDER THE SECURITIES INVESTOR PROTECTION ACT IS THE EXCLUSIVE MEANS BY WHICH THAT CORPORATION CAN BE COMPELLED TO TAKE ACTION

The primary question presented in this case is whether there is an implied private right of action under the Securities Investor Protection Act in addition to the right of action expressly granted to the Commission under Section 7(b) of the Act. We submit that the right of action granted to the Commission is the exclusive means by which the Securities Investor Protection Corporation (SIPC) can be compelled to take action.[2]

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[2] If our submission is accepted, this Court need not reach the second question on which certiorari was granted—whether a receiver of a member has standing to maintain suit. If, however, contrary to our submission, this Court holds that a pri-

1. The Securities Investor Protection Act is designed to provide financial relief for customers who incur losses as a result of financial difficulties of broker-dealer members of SIPC. S. Rep. No. 1218, *supra,* at p. 4; H. Rep. No. 1613, *supra,* at pp. 3-4. To this end, the Act establishes procedures for the orderly liquidation of a financially troubled member under the supervision of SIPC. The provisions of the Act involved here neither create standards of conduct nor impose liability on members.[3] The Act is thus unlike other federal securities laws which prohibit activities harmful to investors.

Where federal securities laws establish standards of conduct designed to protect investors, the Commission has urged, and this Court and lower courts have recognized, that violations give rise to implied causes of action by injured investors.[4]

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vate cause of action should be implied, the question of the receiver's standing would also have to be resolved. Although the status of a receiver and that of customers of a member may differ for purposes of standing, this brief is confined to a discussion of the first question presented since, in our view, the fundamental error of the decision below is its implication of a private cause of action without regard to who may have standing to assert it.

[3] Another important purpose of the Act is to increase the financial responsibility of broker dealers by enlarging the Commission's power to establish financial responsibility rules (15 U.S.C. 78ggg(a)), and by requiring self-regulatory organizations to adopt procedures for financial examination of members (15 U.S.C. 78iii(f)). These provisions are not involved in this case, and there is no occasion to consider whether private rights of action may be implied to enforce the duties created by the Commission's rules issued under these provisions.

[4] See, *e.g., J. I. Case Co.* v. *Borak,* 377 U.S. 426, 431-435; *Superintendent of Insurance of New York* v. *Bankers Life &*

For example, in *J. I. Case Co.* v. *Borak,* 377 U.S. 426, this Court recognized an implied private right of action to redress violations of Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78n, relating to proxy solicitation, stating (377 U.S. at 432):

> Private enforcement of the proxy rules provides a necessary supplement to Commission action. As in antitrust treble damage litigation, the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements. The Commission advises that it examines over 2,000 proxy statements annually and each of them must necessarily be expedited. Time does not permit an independent examination of the facts set out in the proxy material and this results in the Commission's acceptance of the representations contained therein at their face value, unless contrary to other material on file with it. Indeed, on the allegations of respondent's complaint, the proxy material failed to disclose alleged unlawful market manipulation of the stock of ATC, and this unlawful manipulation would not have been apparent to the Commission until after the merger.

Casualty Co., et al., 404 U.S. 6; *Affiliated Ute Citizens* v. *United States,* 406 U.S. 128; *Baird* v. *Franklin,* 141 F. 2d 238 (C.A. 2), certiorari denied, 323 U.S. 737; *Slavin* v. *Germantown Fire Ins. Co.,* 174 F. 2d 799 (C.A. 3); *Hooper* v. *Mountain States Securities Corp., et al.,* 282 F. 2d 195 (C.A. 5), certiorari denied, 365 U.S. 814; *Greater Iowa Corporation* v. *McLendon,* 378 F. 2d 783 (C.A. 8); *Fratt* v. *Robinson,* 203 F. 2d 627 (C.A. 9); *Crist* v. *United Underwriters, Ltd.,* 343 F. 2d 902 (C.A. 10).

In the case of a statute regulating conduct, a private cause of action serves to encourage compliance with the statutory standard and to bring violations to the attention of officials having enforcement responsibility. Cf. *Allen* v. *State Board of Elections*, 393 U.S. 544, 556. Neither purpose would be aided in the case of the Securities Investor Protection Act.

As indicated earlier (p. 6, *supra*), the provisions of the Act involved here do not impose standards of conduct on members. In light of the extensive reporting and inspection procedures established by federal securities laws, a private right of action is unnecessary to apprise SIPC or the Commission of the financial difficulties of a broker-dealer. Member firms must keep detailed records (Rule 17a–3, 17 C.F.R. 240.17a–3) and file certified annual reports with the Commission (Rule 17a–5, 17 C.F.R. 240.17a–5). Moreover, immediate telephonic notice and current reports must be furnished to the Commission whenever net capital falls below the minimum required (Rule 17a–11, 17 C.F.R. 240.17a–11). In addition, the Commission maintains an active inspection program,[5] as do the self-regulatory organizations in the securities industry (15 U.S.C. 78iii(c)), which must report any financial difficulties uncovered to the Commission as well as SIPC (15 U.S.C. 78eee(a)(1)).

2. As shown above, the factors which traditionally have justified the implication of a private right of action are not present in this case. The decision below is, moreover, subject to a more fundamental objection—the implication of a private right of action may frustrate the purposes of the Act.

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[5] See 39th Annual Report of the Securities and Exchange Commission (1973), pp. 58–59.

Congress intended that SIPC perform and the Commission exercise its supervisory authority, consistent with the public interest (15 U.S.C. 78kkk(a); 15 U.S.C. 78eee(e)(3); 15 U.S.C. 78fff(d)). While the protection of customers of SIPC members is the primary goal of the Act, Congress accorded SIPC and the Commission discretion to achieve that goal in the manner most consistent with the public interest.

Accordingly, the most important responsibility of SIPC is to determine whether to apply to a district court for a decree initiating liquidation proceedings with respect to a member.[6] The Act provides that SIPC "may" apply for such a decree if it determines that certain conditions exist (15 U.S.C. 78eee(a)(2)). If SIPC refuses to make such application, the Commission "may" apply to the district court in which SIPC's principal office is located for an order requiring SIPC to act (15 U.S.C. 78ggg(b)). Implicit in this permissive language is the recognition that in some cases, the public interest may be better served if liquidation proceedings are deferred and thus perhaps avoided altogether, even though a basis for initiating such proceedings may exist.

Forbearance may allow time for other viable solutions, such as the infusion of new capital, the transfer of accounts to a financially healthy firm, or the merger, acquisition or self-liquidation of the troubled firm. Whether liquidation proceedings should be instituted may depend on sophisticated financial analyses and familiarity with the investment banking industry, both of which are within the area of the Commission's expertise because of its regulation of broker-dealers under the Securities Exchange Act of 1934.

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[6] If SIPC's application is granted, it is obligated, if necessary, to advance moneys to meet certain customer claims. See p. 3, *supra*.

The decision of the court below may impair the ability of both SIPC and the Commission to exercise properly the discretion to determine the need for liquidation proceedings.

A broker-dealer's customer or its representative would rarely consider the public interest in determining whether to bring an action to compel proceedings under the Act. As SIPC points out (Pet., p. 15), such an action might be brought with respect to a firm in weak but not terminal financial condition and as the result of legitimately disputed transactions between the firm and the customer; such an action, because of the attendant unfavorable publicity, could start a fatal run on the firm. Moreover, by bringing an action prematurely a customer might destroy viable alternatives to liquidation proceedings.[7]

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[7] While these considerations are not applicable to this case since receivership proceedings were nearing completion when SIPC was requested to act, they are relevant to the future administration of the Act. Indeed, the present case was one of the first cases to arise under the Act, and questions concerning the retroactive application of the Act will not recur. Moreover, the factual posture of this case is not likely to recur because both the Commission and the self-regulatory organizations now automatically advise SIPC whenever their inspection and reporting programs reveal that a brokerage firm is approaching financial difficulty. The Commission also gives SIPC specific data concerning a firm whenever the Commission is

3. We submit that the decision below is contrary to the principles of *Nat'l R. R. Passenger Corp.* v. *Nat'l Ass'n of R. R. Passengers,* 414 U.S. 453, where this Court refused to infer a general private cause of action under the Rail Passenger Service Act of 1970 because, *inter alia,* a private action might impair effective operation of the statute. Cf. *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.,* 183 F. 2d 497, 500–501 (C.A. 1).

Like Section 307 of the Rail Passenger Service Act of 1970, 84 Stat. 1333, 45 U.S. 547, which authorized only suits by the Attorney General to compel compliance with the Act, Section 7 of the Securities Investor Protection Act authorizes only the Commission to proceed against SIPC. Nothing in either the legislative history[8] or other provisions of the Act[9] suggests that Congress intended to permit private suits.

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considering the institution of an action based on the firm's failure to meet its financial responsibilities.

[8] The House Report (H. Rep. No. 1613, 91st Cong., 2d Sess., p. 22.) stated:

"Section 7(b) of the bill provides that, should SIPC refuse to commit its funds or otherwise act for the protection of customers of any member, the Commission could apply to a court for an order requiring SIPC to discharge its obligations under this legislation or for such other relief as the court may deem appropriate to carry out the purposes of the legislation—for example, requiring SIPC to file an application * * * [for a decree initiating a liquidation proceeding]."

[9] The court of appeals erroneously relied (App., p. 88) on Section 3(b)(1) of the Act, 15 U.S.C. 78ccc(b)(1), which empowers SIPC "to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State, or Federal" as support for implication of a private right of action. This provision does not create cause of action; it merely permits SIPC to be sued *eo nomine.* See *Blackmar* v. *Guerre,*

The Court also referred to the fact that the statute there involved provided for scrutiny "by both Congress and the Executive * * *." 414 U.S. at 464. Comparably, Section 7(c)(2) of SIPA, 15 U.S.C. 78ggg (c)(2), provides that "[a]s soon as practicable after the close of each fiscal year, SIPC shall submit to the Commission a written report relative to the conduct of its business, and the exercise of the other rights and powers granted by * * *" the Act and that "[t]he Commission shall transmit such report to the President and the Congress with such comment thereon as the Commission may deem appropriate." Indeed, the Commission would appear to have more detailed supervisory power under SIPA than does the Attorney General under the Rail Passenger Service Act. See, *e.g.*, 15 U.S.C. 78ccc(e) (2) and (3); 15 U.S.C. 78ggg(c)(1).

Because of the Commission's responsibilities to regulate broker-dealers under the Securities Exchange Act of 1934 and to supervise SIPC under the Securities Investor Protection Act,[10] the Commission, and

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342 U.S. 512. Indeed, the same power was conferred on the National Railroad Passenger Corporation by the provision subjecting it to the District of Columbia Business Corporation Act (45 U.S.C. 541). See *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U.S. 381, 390.

[10] The House Report (H. Rep. No. 1613, 91st Cong., 2d Sess., p. 12.) stated:

"Your committee has, however, provided for substantial oversight on the part of the Commission over the conduct of the affairs of SIPC. * * *"

* * * * *

"Your committee, not only directs, but expects the Commission to use its oversight in a vigorous, but fair, manner. Only with cooperation and coordination between the efforts of

not customers or a receiver of a broker-dealer, should determine whether SIPC has acted improperly in not instituting liquidation proceedings.[11]

CONCLUSION

For the foregoing reasons, we submit that the court of appeals erred in holding that there is an implied private right of action to compel SIPC to file an application to commence liquidation proceedings under the Act; accordingly, the judgment should be reversed.

Respectfully submitted.

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December 1974.

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the self-regulatory organizations, SIPC and the Commission, can this legislation see its fullest effectiveness."

[11] We do not maintain that Congress intended that the protections of the Act might be arbitrarily withheld from customers of an insolvent broker-dealer whose claims cannot otherwise be satisfied. See S. Rep. No. 1218, 91st Cong., 2d Sess., p. 3; H. Rep. No. 1613, 91st Cong., 2d Sess., p. 3. It may be, therefore, that a determination by the Commission not to take action under Section 7(b) would be judicially reviewable for abuse of discretion. See *Nat'l R. R. Passenger Corp.* v. *Nat'l Ass'n of Railroad Passengers*, *supra*, 414 U.S. at 465 (concurring opinion of Mr. Justice Brennan).

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IN THE

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OCTOBER TERM, 1974

No. 73-2055

SECURITIES INVESTOR PROTECTION CORPORATION,
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JAMES C. BARBOUR, as Receiver for Guaranty Bond and Securities
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SECURITIES AND EXCHANGE COMMISSION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
For the Sixth Circuit

BRIEF FOR JAMES C. BARBOUR, RECEIVER

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On Writ of Certiorari to the United States Court of Appeals
For the Sixth Circuit

BRIEF FOR JAMES C. BARBOUR, RECEIVER

SUMMARY OF THE CASE

The complaint of Respondent Securities and Exchange Commission ("Commission"), filed December 22, 1969, sought only to enjoin the violation of designated provisions of the "Exchange Act"[1] and certain of the Commission's regulations, primarily its "net capital rule."[2] (SA 1-17).[3]

The Securities Investor Protection Act of 1970 ("SIPA" or "the Act")[4] became law eight (8) days later on December 30, 1970.

In the meantime, the defendant registered broker-dealer, Guaranty Bond and Securities Corporation ("Guaranty") had continued to transact business. On January 4, 1971, it filed an Answer denying that it had "knowingly and intentionally operated in contravention of" the statute and rules and outlined its continuing efforts at compliance.

It was not until January 6, 1971, following a hearing on the preceding day, that the District Court issued its preliminary injunction and Guaranty's operations ceased. (SA 41-53).

The Commission applied to the Court on January 21, 1971 for an order appointing a receiver to, among other things, "obtain an accounting of all funds and securities entrusted by customers and other persons to registrant" and alleging that receivership "is apparently the only remedy that will adequately protect the interests of the churches and other religious institutions for which registrant has been acting as underwriter and the interests of the other customers and creditors of registrant." (SA 18).

This Respondent was appointed receiver by an Agreed Order entered January 29, 1971 which contained a finding in the words of the Commission's application that a receivership was necessary to adequately protect the interests of Guaranty's customers. It ordered the receiver "upon the Court's approval, to determine, adjust and protect the equities of creditors, customers and investors whose funds and other property have been entrusted to or invested with said corporation." (SA 55).

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[1] The Securities Exchange Act of 1934, 48 Stat. 895, as amended, 15 U.S.C. § 78a et seq.

[2] 17 C.F.R. 240. 15c 3-1.

[3] "SA" refers to the separate or joint appendix filed herein.

[4] 84 Stat. 1636, 15 U.S.C. § 78aaa et seq.

Respondent was further ordered to make an investigation and then "submit a recommendation to this Court for appropriate steps to be taken to protect the diversified interests of religious institutions for which said corporations have been acting as underwriter, and the interests of creditors and other persons dealing with the said corporations." (SA 58).

Respondent immediately came into possession of more than Fifteen Million ($15,000,000.00) Dollars worth of bearer bonds issued by religious institutions to finance construction of buildings and related facilities. Liquid assets of the insolvent corporations were minimal, however, and it became necessary to obtain court authorization to borrow money in order to defray the initial expense of the receivership.

Respondent determined that Guaranty's operations could not be brought into compliance with the requirements of the law and that there was no feasible course open except dissolution and liquidation. This recommendation was accepted by the Court.

The firm of Peat, Marwick, Mitchell & Co., Inc. was employed to conduct an audit of the bonds on hand and Respondent undertook to categorize the securities and determine their ownership.

After a hearing in which the Court adjudicated title to bonds in the aggregate value of more than Fifteen Million ($15,000,000.00) Dollars, Respondent, in compliance with the Court's order, submitted a plan for liquidation and partial distribution of the bonds and payment of net cash balances due Guaranty's customers. (App. pp. A-1-A-4).[5]

Because the assets of the receivership estate, including the assets of the corporations affiliated with the broker-dealer, were apparently insufficient to pay such balances and also defray the continuing cost of the receivership, the receiver recommended and the Court ordered that the bonds be released to their owners upon deposit of a sum equal to five (5%) percent of the face amount of the securities. (App. pp. A-5-A-6). Respondent has since reimbursed the bond holders in amounts equal to seventy (70%) percent of their original deposits, i.e. 3.5% of bond values. The remaining thirty (30%) percent amounts to approximately One Hundred Seventy-Five Thousand ($175,000.00) Dollars.

In February 1971, the Commission called to Respondent's attention the possible applicability of the SIPA and he was led to believe that the Commission was notifying SIPC of Guaranty's financial condition. For some reason never explained in this record, however, information conveyed by the Commission's regional office in Atlanta to its Washington office failed to reach SIPC.[6]

Respondent was unaware that the Commission had not notified SIPC as it was required to do by Section 5 of the Act, 15 U.S.C. § 78eee(a)(1). He assumed that both the Commission and SIPC would meet their statutory obligations and he proceeded to discharge his own responsibilities under the orders of the District Court, particularly to devise and put into effect a plan to return to Guaranty's customers their securities and net credit balances.

Later, having received no communication from either the Commission or SIPC as to the latter's intention to proceed under the Act, Respondent instructed his attorney to review the SIPA and, if he concluded that it was applicable, to take such steps as might be necessary to invoke its provisions. On May 27, 1971, Respondent's attorney wrote to the Chairman of SIPC and thus gave Petitioner its first notice of the financial plight of its member and the pending proceeding. (SA 24).

SIPC then commenced a series of requests for voluminous documentary information from the receiver, all of which was supplied. Instead of taking a position, pro or con, as to the applicability of the Act, however, SIPC asked that Respondent's attorney write a letter stating his reasons why he thought the customers of Guaranty were entitled to protection under the Act. This was done on June 24, 1971. (SA 26.) The Commission's report followed on July 1, 1971.

SIPC still gave Respondent no intimation of its position until finally, on September 23, 1971, Respondent's attorney wrote again to the Chairman of SIPC requesting its decision. The reply of SIPC's general counsel on October 5, 1971, even at this late date took no unequivocal stand but indicated that while additional information would be helpful, "based on the information presently available this Corporation has no plans for filing an application for the appointment of a Trustee in this proceeding." (SA 38). Respondent had become so frustrated at not being able to obtain a definite answer from Petitioner that he had requested United States Senator William E. Brook, Jr., from Tennessee, to seek a response from SIPC. (SA 40).

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[5] "App." refers to the appendix hereto.

[6] In the District Court, counsel for the Commission stated that he was not able to determine "whether it got lost . . . or whether some lower staff official believed that SIPC intervention wasn't necessary in this case . . ." SIPC counsel stated that it was his understanding, "which is imperfect, because I wasn't at SIPC at the time, but it is my understanding that there was a conscious decision made by somebody, whose name I don't have in my mind right now, at the Commission to the effect that this Act had no application in this."

In answer to a further inquiry from Respondent's attorney, SIPC's letter of November 1, 1971 indicated that its reasons for not intervening in the pending proceeding were "complex and interrelated." It noted that they "involve" the question of retroactivity and the ability of an SIPC trustee to carry out the purposes of the Act at this point in the proceeding. (SA 39).

While the Commission had received a copy of the letter from Respondent's counsel to SIPC on May 27, 1971 and had submitted its report to SIPC on July 1, 1971,[7] it took no action to obtain an adjudication as to whether SIPC should intervene in the pending proceeding.

Respondent was at a loss to know how to proceed but found that a similar question as to the applicability of the Act had been raised and adjudicated in the United States District Court in Colorado in *Lohf v. Casey*, 330 F.Supp. 356. After investigating the pleadings in that action and undertaking unsuccessfully to determine why the Commission had failed to notify SIPC, and to obtain assistance from Commission counsel as to choice of venue,[8] Respondent filed his Petition No. 22 in the District Court against both SIPC and the Commission alleging that he had "done everything within his power to protect the interests of the customers of Guaranty Bond and Securities Corporation, including the return of their bonds and excess credit balances" but that it appeared that they would sustain a loss equal to a portion of the five (5%) percent reserve fund and praying for the entry of an order requiring Respondents to show cause why SIPC should not be required to intervene and afford Guaranty's customers the benefits of the Act. (SA 19-27).

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[7] The Commission did not even then undertake to give SIPC the statutory notice required by § 5(a)(1) of the Act and apparently has never done so. (SA 63).

[8] "You ask our advice as to the proper venue of a proceeding to raise the issues regarding SIPC. I am sorry but we have not researched this question." (SA 66).

SIPC's answer to Respondent's petition alleged that the Act was not applicable to Guaranty, that the receivership proceeding had progressed to such a point that it was not feasible to carry out a proper liquidation under the Act, that SIPC was vested with discretion as to whether or not it would intervene and that the District Court lacked jurisdiction. (SA 29-37).

The Commission's answer admitted that it had advised the receiver of the possible applicability of the Act and that its regional office had conveyed information to the Commission's headquarters in Washington, D.C., but it gave no explanation for its failure to notify SIPC. It alleged that the lack of notice was irrelevant as to the Act's applicability and questioned whether or not Guaranty's customers would sustain a loss. (SA 62-71).

The District Court found that SIPC's response raised three (3) questions: (1) lack of personal jurisdiction over SIPC; (2) lack of subject matter jurisdiction; and (3) exclusion of Guaranty by terms of the Act. While it held the Act inapplicable under the issue of retroactivity, it ruled that "Section 7(b) should give rise to a similar cause of action by a receiver in behalf of a member's customers" and that this was necessary in order to give meaningful effect to the Act in the protection of SIPC's members and their customers. (SA 72-78).

The Court of Appeals found the Act to be applicable and the receiver to have standing, as a representative of the broker-dealer's customers, to initiate the private action implied under the Act. (SA 80-89).

ARGUMENT

I

Customers of a Member of SIPC Have an Implied Right of Action to Compel SIPC and the Commission to Meet Their Obligations Under the Act.

A. Neither the Act nor its legislative history excludes such an action.

The very name of this Act evidences its general purpose. Specifically, Congress undertook "to provide greater protection for customers of registered brokers and dealers and members of national securities exchanges." The protection was to be accomplished by the establishment of a fund to make it possible for such customers to recover "their cash balances or securities" within the limitations of Fifty Thousand ($50,000.00) Dollars for each customer as to securities and Twenty Thousand ($20,000.00) Dollars as to cash balances.[9]

Congress recognized the need of such customers to be similar "to that which prompted the establishment of the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation."[10]

A previous bill, H.R. 18458 had provided for the establishment of a private, non-profit insurance corporation but H.R. 19333 pursued an alternate plan based on the creation of a fund by assessment of SIPC members. The Treasury Department advised Congress "that H.R. 19333 fairly incorporates the objectives of H.R. 18458 to insure customers against loss from business failures of member broker/dealers in the securities industry."[11]

In the present case, Guaranty's customers failed to receive their securities and cash balances to the extent that they were required to make a deposit of five (5%) percent of the face value of their bonds in order to obtain delivery. Because of SIPC's refusal to intervene and the Commission's failure to act, they have been denied the protection specifically provided by Congress.

Under these circumstances, the question then arises as to whether Congress intended for Guaranty's customers to sit helplessly by without a remedy.

Both SIPC and the Commission have questioned the fact of their losses. But it cannot be disputed that the customers were required to make a five (5%) percent deposit about April, 1971 and that only a portion of it has been returned to them in almost four years. Had the Commission given timely notice to SIPC, as it was required to do by the Act, and had SIPC intervened promptly thereafter, the customers would have received their bonds without assessment since the Act provides that:

> "The trustee shall return specifically identifiable property to the customers of the debtor, entitled thereto."
> 15 U.S.C. § 78fff(c)(2)(C).

Moreover, the Act contemplates that this will be accomplished "as promptly as possible" after the Trustee is appointed and he is required to "discharge promptly" the obligations of the debtor to its customers. (15 U.S.C. § 78fff(a)(1) and (g)).

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[9] House Report No. 91-1613, U.S. Code Congressional and Administrative News, pp. 5254-5279.

[10] *Id.*

[11] Letter of Samuel R. Pierce, Jr., General Counsel, Department of the Treasury to Honorable Harley O. Staggers, Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, U.S. Code Congressional and Administrative News, p. 5281.

Most significantly, Congress stipulated that the Court "shall" authorize the Trustee to pay customers their credit balances "notwithstanding the fact that there shall not have been any showing or determination that there are sufficient funds of the debtor available to make such payment . . ." (15 U.S.C. § 78fff(g)).

In the very teeth of this Congressional policy, the Commission and SIPC have insisted that SIPC intervention is not necessary because the customers' losses might be offset by recoveries from the principals of the broker-dealer and they cite language of the District Court's findings and conclusions as to the "defendants" fraudulent conduct. While it is not entirely clear, this finding apparently relates to the corporate defendants only. (SA 51). The receiver has discovered no instances in which the principals derived illegal personal gain from the violations of the Exchange Act and has found no unencumbered assets of the principals out of which to satisfy any judgment obtained. But even if the receiver is mistaken, the customers should not be penalized. SIPC could reimburse them promptly and then pursue its rights of subrogation against the principals if it determines that recoveries may be made.

Both the Commission and SIPC insist that the Act granted to the Commission the exclusive right to compel SIPC to meet its obligations but this is not revealed by the Act's legislative history. There is no indication that the question of a private right of action was ever considered by Congress at any time.

From an examination of the Act itself, however, it is clear that Congress did not exclude any type of suit by any class of litigant. In providing that SIPC might be sued "in any court, state or federal," it must have contemplated that occasions would arise when some aggrieved person, firm or corporation should be allowed to bring suit. Yet it drew no line of demarcation and proscribed no type of action.

One must resort then to Section 7(b) of the Act in order to glean an intimation of Congressional intention to limit the type of suit or litigant which may bring SIPC into "any court, state or federal."

Section 7 is entitled "SEC Functions," and sub-section (a) deals in mandatory terms with the Commission's rule making power.

Sub-section (b), entitled "Enforcement of Actions," is permissive in character and provides that the Commission "may apply" for an order against SIPC.

Sub-section (c) is divided into two sub-sub-sections. The first is again permissive and provides that the Commission "may" make examinations and inspections and require records and reports of SIPC. The second is mandatory, stipulating that SIPC shall submit an annual report to the Commission and that the report shall include financial statements which shall be audited and that the report shall be transmitted by the Commission to the President and the Congress.

While we realize that the paragraphing and topic headings employed by Congress can be given only limited significance, it does appear that Section 7 is but a listing of SEC's functions and it does not on its face purport to set forth the exclusive procedure by which the Act may be enforced.

The insistence of the Commission and SIPC might be more persuasive if Section 7(b) were mandatory in character. Then it might be argued that customers need have no fear that their interests will not be protected because the Commission is under a statutory duty to compel SIPC to meet its obligations under the Act. Under the interpretation urged upon the Court by the Commission and SIPC, however, the latter might for any reason deemed sufficient by it, decline to afford protection to the customers of a member while the Commission might, for that or some other reason deemed sufficient by it, choose not to press the point by seeking an order under Section 7(b).

Of course, this is precisely what has happened in the present case and the SIPC contends that Guaranty's customers are completely without remedy.[12] We submit that Congress never intended customer protection to be at the arbitrary whim and caprice of the Commission and SIPC. Perhaps in any given case, the circumstances may be such that SIPC should not be required to intervene but this is a matter which should be judicially determined and the customers should at least be allowed their day in court.

SIPC argues that Section 7(b) must be construed as vesting an exclusive right in the Commission for several reasons. First, it points out that the Act contains a self-regulatory mechanism which now (as contrasted with the early days of its existence) gives it an "early warning" as to members approaching financial difficulty. Second, it contends that the Act contemplates the exercise of high level discretion on the part of SIPC and then grants to the Commission the extraordinary power to seek what amounts to a mandatory injunction against SIPC.

These are plausible arguments skillfully presented. But when the "mechanism" and the "discretion" and the "extraordinary power" have all utterly failed to achieve the manifest purpose of the Act, the question still remains as to whether Congress intended to leave customers thus remediless. SIPC concedes that it is a "small organization." It has many members and thousands of investors in the 50 states to protect. The Commission's surveillance of SIPC is only one of a myriad of activities with which it is burdened and it therefore may not be assumed that these two bodies will not ever overlook a situation in which

customers deserve protection or ever make an unwise or perhaps arbitrary decision as to whether or not in fact they should be protected.

The customers themselves have the greatest stake in seeing that the legislative purpose is carried out. They know better than anyone else the extent of their losses. It was Congress's concern for their welfare which brought about the enactment of the legislation. The mechanism, discretion and extraordinary power were created merely as a means to accomplish that end, not as the end itself. When the means fails to even set the procedure in motion, the legislative purpose must not be frustrated when federal courts have the power to fashion a remedy to implement that purpose.

Having extolled the virtues of the "means" prescribed by Congress, SIPC then argues that the exclusivity of Section 7(b) is indicated by Congress's failure to grant a similar power to self-regulatory organizations such as the exchanges and dealer associations. This would not appear to be of significance since the legislative history records the failure of such organizations to provide adequate customer protection in the first place. (House Report, U.S. Code Congressional and Administrative News, p. 5257). Indeed, this was one of the reasons for enacting the legislation and there would be no logical reason to give these same organizations supervisory and enforcement powers over SIPC.

The legislative scheme for surveillance and enforcement by the Commission was a logical extension of that Agency's existing functions but it is adequate only if the securities investor also has a right of action to seek protection when the system fails.

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[12] The Commission concedes that its "determination" not to take action may be judicially reviewable. The Receiver has never been advised as to the fact or the reasons for such determination.

B. **Prior decisions of this Court do not exclude a private cause of action under the SIPA.**

SIPC relies upon *National RR Passenger Corp. v. National Association of RR Passengers*, 414 U.S. 453 (1974) ("Amtrak") and certainly no consideration of the present case would be complete without reference to that decision. It is true that there are similarities between the two Acts but the distinctions are decisive.

The Court there applied the maxim, *expressio unius est exclusio alterius*, which is frequently a helpful tool in statutory construction. The Amtrak Act, however, expressly conferred a private cause of action on employees and labor unions in addition to the enforcement powers granted the Attorney General. It therefore impliedly excluded any other private cause of action.

Here, on the other hand, the Act is silent as to private causes of action but grants only the power vested in the Commission under Section 7(b), which is roughly analogous to the power given the Attorney General by the Amtrak Act.

The application of the maxim there was further strengthened by the legislative history which indicated an unsuccessful attempt to amend the Act so as to give a private cause of action to any persons aggrieved. No such attempt was made with reference to the SIPA and it therefore cannot be argued that Congress rejected the concept of a private enforcement action.

Equally, if not more important, is the effect upon the stated legislative purpose of allowing a private cause of action under each of the two Acts. This Court found that to permit railroad passengers to enjoin the discontinuance of uneconomic lines would frustrate one of the principal objectives of the Amtrak Act. To permit securities investors to compel SIPC to meet its obligations to them under the Act, on the other hand, can only serve to make certain that the legislative purpose of customer protection is accomplished. SIPC and the Commission disagree and SIPC contends that to grant such a cause of action will "subvert the statutory apparatus and the balancing of public interest." (SIPC Br., p. 31). It points out that the commencement of a private action could interfere with consideration of a member's difficulties, could frustrate efforts to find alternatives to liquidation and could start a run on a firm in marginal financial condition. These are, of course, important considerations but they are not, in the final analysis, the situation which Congress undertook to remedy.

As stated in the House Report:

> "The primary purpose of the reported bill is to provide protection for investors if the broker-dealer with whom they are doing business encounters financial trouble. In these circumstances public customers sometimes encounter difficulty in obtaining their cash balances or securities from the broker-dealer."
>
> U. S. Code Congressional and Administrative News, p. 5255.

The legislation was enacted as an alternative to a plan such as the Federal Deposit Insurance Corporation Act and Congress's concern was that customers obtain the return of their securities and cash balances. The protection of SIPC's "consideration" of members' difficulties and its efforts to find alternatives to liquidation and to avoid a run on a member are all preliminary matters which are important in this statutory scheme only to the extent that they ultimately insure that the customers recover "that to which they are entitled." U.S. Code Congressional and Administrative News, p. 5255.

It is insisted that Congress gave SIPC and the Commission discretion to achieve the goal of customer protection "in the manner most consistent with the public interest." (Comm. Br.,

p. 9). This is a plausible premise but the Commission's conclusion does not follow. It cites sections of the Act requiring public access to reports unless "not in the public interest," permitting the Commission to make rules and regulations "in the public interest" and requiring completion of open contractual commitments consistent with "the public interest."[13] Neither these nor any other sections of the Act suggest a Congressional caveat that customers are not to be protected unless the Commission and SIPC determine, in their discretion, that it is in the public interest. The "forbearance" which they stress can be ordered by any Court to which application is made so long as SIPC is indeed seeking "other viable solutions." In the instant case it took no action and failed to so much as reveal its intentions for approximately four months until pressed by this Respondent.

The Commission argues that it, "and not customers or a receiver of a broker-dealer, should determine whether SIPC has acted improperly in not instituting liquidation proceedings."[14] But we submit that this is a matter to be determined by none of these parties but by the United States District Court to which application is made. We seek only an opportunity to make the application, not the determination.

SIPC relies also upon *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297, 88 L.Ed. 61 (1943) which, unlike the present case, involved judicial review of an administrative board decision. There, however, the Railway Labor Act provided a "neutral tribunal" to make decisions after consideration of the contentions of disputing parties. There was thus an opportunity for the complaining Union to be heard by the administrative body. This Court found that Congress intended the Board's determination in jurisdictional disputes to be final and not subject to judicial review, particularly because Congress had spelled out provisions for judicial review in other sections of the Act relating to determinations by the National Railroad Adjustment Board in disputes concerning rates of pay, rules, or working conditions and awards of boards of arbitration. This Court said:

> "When Congress in Section 3 and in Section 9 provided for judicial review of two types of orders or awards and in Section 2 of the same Act omitted any such provision as respects a third type, it drew a plain line of distinction."
>
> 88 L.Ed. 67.

There are no comparable provisions in the SIPA. Neither SIPC nor the Commission makes an order or award after a hearing in which securities investors are allowed to present their appeal for protection under the Act. Both SIPC and the Commission make ex parte determinations and, as appears from the present case, it can be difficult to even obtain such a determination, much less to discover its basis. To adopt their interpretations of the Act, one must conclude that Congress simply foreclosed securities investors from asserting their own rights and left them to the mercy of SIPC and the Commission which need not account to anyone. In this connection, while SIPC must file an annual report which the Commission forwards to the President and Congress, there is no suggestion that such a report would afford any reasonable basis for a review of SIPC's determination and the Commission's acquiescence that the customers of a particular broker-dealer were not entitled to protection under the Act.

Petitioner quotes from *Fleischmann v. Maier Brewing Company*, 386 U.S. 714, 18 L.Ed. 475, 87 S.Ct. 1404 to the effect that when a cause of action has been created by a statute which provides specific remedies, others will not be readily implied.

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[13] 15 U.S.C. § 78kkk(a); 15 U.S.C. § 78ccc(e)(3); 15 U.S.C. § 78fff(d).

[14] Commission Brief, p. 13.

That case involved the Lanham Act (15 U.S.C. §§ 1051-1127) which provided in Section 35 that a plaintiff in a trademark violation suit may recover (1) defendant's profits, (2) damages sustained by plaintiff and (3) costs of the cause. The Court held merely that plaintiff might not also recover its attorney's fees.

The language quoted by Petitioner has no application to the facts of this case because the SIPA does not in so many words grant any specific remedy to securities investors. The surveillance and enforcement powers of the Commission are no remedy available to investors. As to these provisions, broker-dealer customers are mere onlookers or bystanders with no opportunity to be heard. Therefore, in the absence of an express prohibition, a private cause of action should be implied which is adequate to achieve the stated legislative purpose.

In *Amtrak*, this Court acknowledged that principles of statutory construction such as the maxim—*expressio unius est exclusio alterius*, must yield to clear contrary evidence of legislative intent and in *Securities and Exchange Commission v. Joiner Leasing Corp.*, 320 U.S. 344, it was held that such maxims must be "subordinated to the doctrine that courts will construe the details of an Act in conformity with its dominating general purpose." 88 L.Ed. 93. The "dominating general purpose" of the SIPA is clearly protection of securities investors[15] and the specific objective is the establishment of a procedure under which they can obtain the return of their securities and cash balances within the limitations prescribed. When both SIPC and the Commission fail or refuse to activate that procedure and Congress has not plainly proscribed it, a private cause of action should be implied.

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[15] In *Amtrak* it was argued that "railroad passengers are merely indirect beneficiaries" of the Act (475 F.2d 340) and this Court observed only that "respondent claims that railroad passengers are the intended beneficiaries of the Act." (38 L.Ed.2d 651). There can be no dispute that securities investors are designated as the direct and primary beneficiaries of the SIPA.

It will be recalled that the receiver's Petition No. 22 was directed to both the Commission and SIPC and the Court entered its Order No. 49 requiring each to show cause why "the remedies afforded by the Act should not be made available in this proceeding." (SA 28). The Administrative Procedure Act (5 U.S.C. § 500, et seq.) was not cited in the Petition as a basis for jurisdiction but the judicial review sections (5 U.S.C. § 701, et seq.) would presumably be applicable to the Commission, if not SIPC. The latter is not an agency of the United States Government but is, at most, a quasi-public corporation not for profit.

The APA does not apply to agency action to the extent that it is committed to the agency's discretion by law. (5 U.S.C. § 701). Section 7(b) of SIPA provides that the Commission "may" apply for an order. Section 5(a)(1) of the Act, however, is mandatory and requires the Commission to notify SIPC that a member is in or approaching financial difficulty. The response of the Commission in the District Court admits that it failed to give official notice to SIPC and implies that it has never made a formal determination with respect to whether or not it should seek an order against SIPC under Section 7(b). It merely alleges that there has been no demonstration that Guaranty's customers will suffer a loss. (SA 64). The inference is that if in fact they will sustain a loss, the Commission might agree that SIPC should be required to intervene. This is slight comfort in view of the Commission's demonstrated lack of enthusiasm for taking any affirmative action on behalf of Guaranty's customers other than the application for the appointment of a receiver. In the meantime, they are left in limbo unless they are permitted to help themselves through the efforts of that same receiver.

As this Court observed in *Barlow v. Collins*, 397 U.S. 159, 25 L.Ed.2d 192, 90 S.Ct. 832:

> "The right of judicial review is ordinarily inferred where Congressional intent to protect the interests of the class of which the plaintiff is a member can be found: in such cases, unless members of the protected class may have judicial review of statutory objectives might not be realized." (sic)
>
> 25 L.Ed.2d 200.

While we have found no previous decision of this Court which presents precisely the situation prevailing in the present case, the decision in *J. I. Case Co. v. Borak*, 377 U.S. 426, 12 L.Ed.2d 423, 84 S.Ct. 1555 (1964), seems more nearly in point than *Amtrak*. It is significant that the Court was dealing there with securities legislation and a matter specifically entrusted to the Commission for enforcement. It was held that federal courts have the power to grant all necessary remedial relief in a stockholder's suit for violation of Section 14(a) of the Securities Exchange Act of 1934. That Act provides at Section 21(e) as follows:

> "Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond." * * *
>
> 15 U.S.C. § 78(u)(e).

It was contended that Congress made no specific reference to a private right of action but the Court replied:

> "While this language makes no specific reference to a private right of action, among its chief purposes is the 'protection of investors' which certainly implies the availability of judicial relief when necessary to achieve that result."
>
> 12 L.Ed.2d 427.

The Commission seeks to distinguish *Borak* and other private enforcement action decisions because the statutes there involved provided "standards of conduct" for the protection of investors which private actions assist in enforcing. Here, however, Congress provided a fund and a procedure for the protection of investors and we submit that the importance of achieving that legislative purpose is not diminished by the absence of the incidental benefits of enforcement. Congress attached no such condition.

The later case of *Allen v. Board of Elections*, 393 U.S. 544, 22 L.Ed.2d 1, 89 S.Ct. 817, is also in point. It relied on *Borak* in holding that private citizens have standing to bring an action in the federal court to enforce provisions of the Voting Rights Act of 1965 even though this right is expressly conferred upon the Attorney General. Section 12 provides that the Attorney General "may institute" an action for preventive relief, including an application for a temporary or permanent injunction and that he "may" file with the District Court an application for an order with respect to the marking and counting of ballots. (42 U.S.C. § 1973j(d)(e).

This Court noted that the Act "does not explicitly grant or deny private parties authorization to seek a declaratory judgment that a state has failed to comply with the provisions of the Act." (22 L.Ed.2d 11).

It held, however, that "there is certainly no specific exclusion of private actions" and it observed:

> "The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General."
>
> 22 L.Ed.2d 11-12.

The Court found merit in the argument "that the specific references to the Attorney General were included to give the Attorney General power to bring suit to enforce what might otherwise be viewed as 'private' rights." (Footnote 18, 22 L.Ed.2d 11).

It also noted that the guarantee of the Act as regards the necessity for approval of voter laws "might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." (22 L.Ed.2d 12).

By this same reasoning, Congress's undertaking to "insure customers against loss" will prove to have been an idle gesture as to Guaranty's customers unless this private cause of action is sustained. (U.S. Code Congressional and Administrative News, p. 5281).

II

If Customers of a Broker-Dealer Have an Implied Right of Action Under the Act, It May Be Asserted by an Equity Receiver Appointed and Ordered to Protect Their Interests.

While the questions of implied right of action and standing are separate matters, as observed by this Court in *Amtrak*, we take it that Petitioner does not controvert the right of customers to assert directly such cause of action as may be implied under the Act. Its contention is rather that "a receiver lacks standing to assert that right on their behalf under controlling decisions of this Court." (Petitioner Br., p. 32).

There are many types of receivers, appointed pursuant to either a specific statute or the inherent equity power of the Court, under a variety of circumstances and for different purposes. Respondent was appointed under the broad equity powers of the District Court, not merely to collect and conserve the debtor's assets for the benefit of its creditors but "upon the Court's approval, to determine, adjust and protect the equities of creditors, customers and investors whose funds and other properties have been entrusted to or invested with said corporations." (SA 55). He was ordered to "submit a recommendation . . . to protect the diversified interests of religious institutions for which said corporations have been acting as underwriter, and the interests of creditors and other persons dealing with the said corporations." (SA 58).

Immediately upon his appointment, the receiver found himself custodian of more than $15,000,000.00 worth of bearer bonds which had to be audited, classified and either liquidated or distributed if it developed that they were the property of others. He ultimately determined and the District Court held that the bonds were not assets of the receivership estate and should be distributed to the rightful owners. The problem was that the actual assets of the estate were not sufficient to pay customers their net cash balances and to defray the costs and expenses of the receivership, many of which were incurred in the auditing, classifying and distribution of the customers' securities.

It was the receiver who recommended to the Court that he be allowed to return the bonds to the record owners and pay their cash balances but that they each be required to make a cash deposit equal to five (5%) percent of the face value of the bonds as adjusted by such balances.

Thus, while the receiver was engaged in carrying out his instructions to protect the interests of the customers, he also found it necessary, with the approval of the Court, to exact an assessment from these same customers. It is therefore only fitting and proper that he should take the initiative in attempting to recover for those investors the remainder of the deposit which he has been unable to return to them. He has pursued this obligation by filing a petition in the Court which appointed him. (*U. S. v. Lewis*, 338 F.2d 187 (CA 6, 1964)). This is the Court which is most familiar with the plight of the customers, having approved the plan for distribution and assessment. This Court is more knowledgeable than any other court in the land as to whether or not the customers of Guaranty Bond and Securities Corporation "are in need of protection" under the Act.

The receiver has proceeded as an officer and representative of the Court which has repeatedly expressed its concern that the protection of the religious institutions and individual customers of Guaranty be placed above all other considerations in the administration of the receivership estate. It was for this reason, again with the approval of the Court, that the assets of the affiliated corporations were pooled with those of the broker-dealer in order to assure sufficient funds out of which to return to the investors their net cash balances. This substantially depleted the assets of the receivership estate and contributed to the necessity for the five (5%) percent reserve fund.

The standing of the receiver depends upon his power and duty to represent the interests of the customers. In general:

> "A receiver has the following powers and duties.
>
> First: Those powers and duties directly stated in the order of the Court appointing the receiver and such subsequent powers and duties as may from time to time be given.
>
> "Second: Those powers or duties clearly implied from the order or orders of the Court appointing the receiver and which are clearly and reasonably necessary to the carrying out of such order or orders."
>
> Clark, *Law of Receivers*, 3rd Ed., § 355.

In *Booth v. Clark*, 17 Howard 322, 15 L.Ed. 164, it was said that a receiver "is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause." (15 L.Ed. 168).

In *Davis v. Gray*, 16 Wall. 203, 21 L.Ed. 447, it was said that a receiver "is virtually a representative of the Court, and of all the parties in interest in the litigation wherein he is appointed." (21 L.Ed. 452).

Petitioner places great reliance on the decision in *Caplin v. Marine Midland Trust Co. of N. Y.*, 406 U.S. 416 (1972), and *Clarke v. Chase National Bank*, 137 F.2d 797 (CA 2, 1943), which preceded it. There it was held that a Chapter X[16] trustee could not bring suit against an indenture trustee on behalf of bond holders because: (1) Chapter X gives the trustee no such power; (2) The debtor for whom the trustee was appointed, being *in pari delicto*, had no independent claim against the indenture trustee and (3) The trustee's action would be in conflict with any independent actions brought by individual bond holders.

We do not believe these decisions to be controlling here since Respondent is not restricted by the provisions of Chapter X which goes no further than to give the trustee the powers a receiver in equity would have if appointed by a court of the United States "for the property of the debtor." Here Respondent was not appointed as receiver of the property of the debtor alone but was ordered to protect the interests of the debtor's customers and investors.

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[16] 11 U.S.C. § 587.

It may be true that Guaranty Bond and Securities Corporation has no implied right of action under the statute since the Act was not intended for the protection of broker-dealers, but here Respondent was appointed as a representative of all the parties, not Guaranty alone and he was required to submit a plan to protect the interests of the religious institutions and other persons dealing with the debtor. That plan achieved the Court's objective of returning to the customers their securities and net cash balances but, in so doing, it created the loss which the receiver now seeks to recover on behalf of those same parties.

The third reason assigned in *Caplin* is likewise inapplicable here since the receiver's action cannot be inconsistent with any individual actions brought by Guaranty's customers. The only objective of this or any individual proceeding is to require SIPC to meet its obligations under the Act. If successful, the relief granted in each case would be identical. Any independent action by individual customers could only complement and strengthen the receiver's application.

While Petitioner protests that the receivership has progressed beyond the point at which the statutory purpose can be accomplished, we insist that the primary purpose of the statute was to insure that customers receive their securities and net cash balances. The liquidation procedure of which Petitioner makes so much is only the means by which this is to be accomplished. It is not in a position to complain if the receiver has already carried out most of this procedure, even if he did not follow the letter of the Act, provided only that the interests of investors were duly protected. There is no suggestion to the contrary. So long as these customers continue to be deprived of the return of their cash balances, there is indeed an opportunity for Petitioner to carry out the statutory purpose and it should be required to do so.

Petitioner also makes the point that because of its right of subrogation, the net asset value of the receivership estate would not be affected by a decision in Respondent's favor. This is true but immaterial. The question here, unlike that in *Caplin*, is whether Guaranty's customers are entitled to be protected in conformity with the District Court's instructions to the receiver. It is of no consequence that the general receivership estate will not be increased or decreased since the receiver's powers and duties are not limited to the preservation and distribution of those assets.

Petitioner also relies upon *McCandless v. Furlaud*, 296 U.S. 140 (1935) which sustained the right of the receiver to sue promoters of the corporation who took unconscionable profits on the sale of the company's stock and bonds. The majority of the Court held that these profits were assets of the corporation which had been diverted and could be reclaimed by the receiver whether or not the corporation would have been estopped. Four members of the Court were of the opinion that the receiver's right was no greater than that of the corporation and he lacked standing to bring suit. The decision is not helpful here because of the broader scope of the powers and duties assigned to Respondent by the District Court's Order and the subsequent proceedings which placed the receiver in a fiduciary relationship to Guaranty's customers and gave rise to his obligation to assist them in recovering the remainder of their net cash balances exacted of them under his plan of partial distribution.

No reported decision which we have been able to discover has dealt with a situation precisely like the one in the instant case. Guaranty's customers were more than "a special class of Guaranty Bond's creditors" as they are characterized in Petitioner's brief. Guaranty, and later Respondent, stood in a fiduciary relationship to these customers holding their property in trust. It is the primary objective of the SIPA to achieve the return of that very property to such customers. It was likewise the primary objective of the District Court in this case. Because of the inadequacy of the available assets, the receiver was, in effect, forced to withhold five (5%) percent of the customer's property. There seems to be no sound reason why he should not have standing to take the next step and seek to obtain for the customers the reimbursement of the withheld funds by invoking the provisions of a statute passed for the specific purpose of so protecting them.

The Court of Appeals has held the Act applicable to Guaranty's operations and certiorari was not granted as to this portion of the ruling. Should it now be held that Guaranty's customers have an implied right of action against SIPC but that Respondent has no standing to assert it, it may be presumed that one or more of such customers will promptly initiate a direct proceeding to accomplish the same result.

CONCLUSION

Perhaps it should be said that in pressing this cause Respondent seeks only to discharge the duties and obligations placed upon him by the District Court. It may be that, if successful, he will have brought about his own dismissal since under Section 5(b)(3) of the Act, SIPC has the right to "specify" a trustee of its choice. He nevertheless earnestly insists that there is no valid reason why Guaranty's customers should be denied the benefits of the Act and he urges this Court to affirm the decision of the Court of Appeals.

Respectfully submitted

W. OVID COLLINS, JR.
18th Floor
Third National Bank Building
Nashville, Tennessee 37219
Attorney for Respondent

APPENDIX

Filed:

April 7, 1971

In the United States District Court
For the Middle District of Tennessee
Nashville Division

Securities and Exchange Commission vs. Guaranty Bond and Securities Corporation, et al.	Civil Action No. 5989

Petition No. 14 of James C. Barbour, Receiver
Plan for Partial Distribution

Petitioner respectfully shows to the Court:

I

That pursuant to the provisions of Order No. 20 herein, petitioner has consulted and conferred at length with his attorney and accountants and has considered suggestions from attorneys for various petitioners herein in an effort to arrive at a workable plan for partial liquidation and distribution which would enable him to make delivery of the bonds in his custody to their owners without further delay, while at the same time maintaining a reserve fund against contingencies, discrepancies, conflicting claims and the continuing costs of the receivership for an undetermined period of time.

II

That petitioner and his advisers first considered the possibility of retaining a certain percentage of the bonds for this purpose but certain problems were anticipated: the selection of the particular bonds to be retained, the liquidation of the bonds when cash is needed, the selection of the bonds to be liquidated, the partitioning in kind of small I.M.A. accounts, the expense of two distinct distributions and the continuing processing of retained bonds until final liquidation.

III

That petitioner therefore proposes that all bonds in his custody and those held by others under Order No. 10 be released to the record owners upon deposit with Nashville City Bank and Trust Co. or the owner's bank to the Receiver's credit, of a sum of money in cash, equivalent to 5% gross of the face amount of the bonds on January 29, 1971 adjusted by credit and debit balances as of the settlement date. The issuance of statements of account can begin almost immediately after entry of an appropriate Order. Thus, if a particular I.M.A. customer owns one $5,000.00 bond and has a credit balance of $100.00, the deposit of 5% gross would amount to $250.00 but it would be reduced by the credit balance of $100.00 to a net cash payment of $150.00 required in order to obtain delivery of the bond. If, on the other hand, the customer had a debit balance of $100.00 (there are very few of these), this sum would be added to the 5% and the customer would be required to make a payment of $350.00 in order to get possession of his bond. In cases where credit balances exceed 5% of the face value of the bonds, distribution of such excess amounts will be made by the Receiver after sufficient funds are accumulated to pay all such amounts.

IV

That it appears that net credit balances amounted to approximately $352,000.00 as of January 29, 1971 which will immediately reduce the sum to be realized by approximately this amount. On the other hand, there are assets of the corporation which the Receiver has not yet been able to liquidate but which it is anticipated will eventually contribute to the payment of the costs of the receivership. Any sum left in the reserve account upon final termination of this proceeding will be distributed to bond owners on a pro rata basis.

V

That in the case of bond owners who, prior to June 1, 1971 fail to advance a sum of money equal to 5% (as adjusted) of the bonds owned by them, the Receiver will retain the bonds and continue clipping the coupons until the required amount has been realized. As an alternative, such bond owners may elect, by notifying the Receiver in writing prior to June 1, 1971, to receive one-half of the coupon interest earned from April 1, 1971, as collected by the Receiver, until such time as the required amount is accumulated or this proceeding is terminated, whichever occurs first.

Wherefore, Premises Considered, Petitioner Prays:

1. That a copy of this Petition be mailed to designated counsel of record and petitioners who have filed claims without benefit of counsel and that a hearing be held at the earliest practicable date.

2. That at the hearing an Order be entered approving the foregoing plan for partial liquidation and distribution or such

modification or substitute therefor as to the Court may seem proper and appropriate.

3. For general relief.

/s/ JAMES C. BARBOUR
Receiver

/s/ W. OVID COLLINS, JR.
Attorney for the Receiver

State of Tennessee
County of Davidson

James C. Barbour, being first duly sworn, makes oath that the statements contained in his foregoing Petition are true to the best of his knowledge, information and belief.

/s/ JAMES C. BARBOUR

Sworn to and subscribed before me this 5th day of April, 1971.

/s/ PATRICIA R. SILLS
Notary Public

My commission expires: Nov. 24, 1974.

Entered:

April 19, 1971

In the United States District Court
For the Middle District of Tennessee
Nashville Division

Securities and Exchange Commission
vs.
Guaranty Bond and Securities Corporation, et al.

Civil Action No. 5989

Order No. 22

This cause having come on to be heard upon the Receiver's Petition No. 14, proposing a plan for partial distribution, it is Ordered that such plan be put into effect as to all bond owners who file no written objections thereto with the Clerk of this Court within 20 days from the date hereof. All such objections will be disposed of by the Court in due course.

It is accordingly Ordered that all bonds now in the custody of the Receiver and in the custody of the various attorneys and institutions under Order No. 10 shall be released to the record owners upon deposit with the Nashville City Bank & Trust Company or the owner's bank to the Receiver's credit, of a sum of money in cash, equivalent to 5% gross of the face amount of the bonds as of January 29, 1971 adjusted by credit and debit balances as of the settlement date but only to the extent that such balances represent traceable funds of the bond owners impressed with a trust in the hands of the Receiver.

Statements of account will be issued by the Receiver as promptly as possible so that the amount of the required deposit can be ascertained by each bond owner. In cases where credit balances consisting of trust funds exceed 5% of the face value of the bonds, distribution of such excess amounts need not be made by the Receiver until sufficient funds are accumulated in the reserve account to pay all such amounts.

The Receiver will retain the bonds of owners who fail to advance the required deposit by June 1, 1971 and continue clipping the coupons until the amount of the deposit has been realized but any such bond owners who so elect by notifying the Receiver in writing prior to June 1, 1971, may receive one-half of the coupon interest earned from April 1, 1971, as collected by the Receiver, until such time as the required amount is accumulated or this proceeding is terminated, whichever occurs first.

A copy of this Order will be mailed by the Clerk to all parties of record or their counsel.

/s/ L. CLURE MORTON
District Judge

Approved for Entry:

W. OVID COLLINS, JR.
Attorney for the Receiver

Supreme Court, U. S.
FILED
MAR 10 1975
RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2055

SECURITIES INVESTOR PROTECTION CORPORATION,
Petitioner,
v.

JAMES C. BARBOUR, AS RECEIVER FOR GUARANTY BOND AND SECURITIES CORPORATION AND GUARANTY BOND COMPANY, INC.,
Respondent,
and

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

The Receiver's brief does not dispute SIPC's statutory analyses which show that Congress meant to vest the Commission with exclusive enforcement power over SIPC *via* section 7(b) and other provisions. Disdainfully bypassing those analyses as "plausible arguments skillfully presented" (Rec. Brief, p. 12), the Receiver's tactic is **(a)** to wring out of the purported facts of this case a baroque critique of the statutory apparatus, and (b) to motivate this Court to perfect the work of Congress by a public distribution of supervision under the guise of discerning a congressional "implication" of a collateral private enforcement remedy. There is no substance or relevance to the critique (discussed below). But more important, the Receiver's brief fails to suggest a basis for implication beyond (a) the broad protective purpose of the 1970 Act, which was hardly unknown to Congress when it drew its statutory plan, and (b) the inclusion among SIPC's general corporate powers of a boilerplate provision that it may "sue and be sued". Reliance upon the concept of "implied" remedies in this case is a euphemistic request for judicial legislation.

Whether the Commission or SIPC have performed well under the 1970 Act, either generally or in this case, requires evaluations and judgments for which this appeal is hardly an appropriate vehicle. Moreover, speculation in that area would be relevant to congressional wisdom which only Congress can review, not congressional intent which is the issue at bar. Nevertheless, brief comment on the Receiver's innuendoes seems appropriate.

The Receiver does not suggest that the Commission or SIPC has a history of recalcitrance or caprice under the 1970 Act.[1] His rhetoric is predicated solely upon the pleadings in this case. Extrapolating from those pleadings he conjures a situation in which securities customers with alleged "rights" under the 1970 Act have been denied protection by SIPC's decision not to initiate a Liquidation Proceeding, and the Commission's decision not to proceed against SIPC under section 7(b). However, those pleadings actually reveal that neither caprice nor oversight accounts for SIPC's determination. It has several bases under the 1970 Act for declining to initiate a Liquidation Proceeding (SA 31-37). The Court of Appeals rejected only one. Moreover, the Receiver too facilely assumes that deposits to cover receivership expenses are losses which the 1970 Act protects.[2] As an added fillip the Receiver suggests that SIPC was guilty of bureaucratic delay, which this record does not support (SA 24-28, 38-40, 63, 67). Underlying the Receiver's position is the naked assumption that the 1970 Act should have been invoked, a conclusion with which both SIPC and the Commission have been unable to agree.

Shorn of its forensic embellishments the Receiver's position is that both SIPC and the Commission may err, and that Congress could not have "foreclosed securities investors from asserting their own rights" (Rec. Brief, p. 17). Among the difficulties with that argument is that it speaks of foreclosing rights when the question is whether a right and a remedy were granted. In a very real sense customers have no rights under the 1970 Act except those which accrue as a result of a Liquidation Proceeding actually commenced. Before that occurs they may well have an interest in whether a proceeding is commenced, but the issue presented is whether by implication Congress intended them to possess the same supervisory instrument over SIPC which it specifically reserved to the Commission.

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[1] The record is quite the contrary. To date 111 firms have been placed in liquidation by SIPC. Some of those cases involved thousands of customers. See, *e.g.*, SIPC's Brief, p. 21 n. 68. But SIPC has provided protection in numerous situations involving relatively few customers. Thirty-seven cases involved only seventy-five or fewer customers. Of those, twenty-three involved fifty or fewer customers, and four involved less than ten. Except for this case and two others which presented an issue which should never again arise [Lohf v. Casey, 466 F. 2d 618 (10th Cir. 1972) and Bohart-McCaslin Ventures, Inc. v. Midwestern Securities Corp. 352 F. Supp. 937 (N.D. Tex. 1973)], SIPC has not declined to invoke the 1970 Act in any case actually involving customer loss except in five situations where the broker-dealer's registration with the Commission had been terminated prior to the discovery of customers' losses. Such termination *ipso facto* ended each firm's membership in SIPC thereby placing its customers outside SIPC's statutory authority to protect customers of its "members" only. The Commission and SIPC have solved the problem by a procedure whereby the Commission will restore registered status to these firms for the limited purpose of SIPC membership, thereby enabling SIPC to initiate a Liquidation Proceeding for the protection of customers. In all only about thirty-nine customers are involved, and SIPC's administrative costs will far exceed the dollar amount of the protection to be afforded.

[2] Understandably, the Receiver has exhibited some unfamiliarity with the provisions of the 1970 Act. Thus, when his attorney first contacted SIPC he asked that his letter be treated "as a claim on behalf of the Receiver" (SA 25) and that funds be advanced to him to satisfy claims (SA 24-27). At least some of the depositors were the issuers of bonds for which Guaranty Bond acted as underwriter (SA 70). SIPC's main brief (at page 14) touches upon the somewhat technical parameters of customer protection.

That either the Commission or SIPC may err, in the judgment of others, is hardly a basis for altering the congressional scheme. Congress was well aware that there is no institution of men immune to error when it entrusted the extraordinary enforcement remedy solely to the Commission. The Congress reposed such confidence in SIPC, perhaps partly because of the legislated composition of its board of directors, that it thought it "unlikely" the Commission would have to resort to the section 7(b) remedy.[3] In granting that remedy it selected the agency which helped draft and sponsor the 1970 Act, which possesses the requisite expertise and public responsibility, and which has no ax to grind for any objective other than the protection of investors in whose service it has labored for forty years. That both SIPC and the Commission will fail in their duties in the same situation is difficult to imagine, although obviously not an impossibility. Whatever the risks, however, Congress legislated a novel program and selected the guardians of its trust. It clearly did not "imply" that the investing public should also supervise that program, a decision which the briefs of the Commission and SIPC demonstrate is supported by obvious important policy considerations.

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[3] See S. Rep. No. 91-1218, 91st Cong., 2d Sess. 15 (1970).

Insofar as prior decisions of this court may offer guidance here, the Receiver cites *J. I. Case Co.* v. *Borak,* 377 U. S. 426 (1964), as "more nearly in point than *Amtrak.*" (Rec. Brief, p. 20). SIPC of course disagrees. The *Borak* case is distinguishible on at least two significant bases. First, unlike *Amtrak,*[4] *Borak* did not involve the supervision of a federally chartered corporation. The Commission's brief (at pages 6-8) quite properly notes that *Borak* and a related line of cases recognize a private remedy for the redress of a wrong done to the plaintiff in violation of law. The wrong in such cases involves the breach of substantive statutory duties, conduct which is effectively tortious in nature. Thus, Justice Harlan has observed:

> "The notion of 'implying' a remedy, therefore, as applied to cases like *Borak,* can only refer to a process whereby the federal judiciary exercises a choice among *traditionally available* judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law." *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U. S. 388, 402n.4 (1971).

As can readily be gleaned from the authorities cited in such cases as *Wyandotte Transportation Co.* v. *United States,* 389 U. S. 191, 202 (1967) and *Ash* v. *Cort,* 496 F.2d 416, 421-422, 423 (3d Cir.), *cert. granted,* 95 S.Ct. 302 (1974), the *Borak* line of cases merely applies the ancient principle, rooted in the common law of England, that the law will provide a remedy for injuries caused by a wrongful act. *Texas & Pacific Ry. Co.* v. *Rigsby,* 241 U. S. 33, 39-40 (1916).[5]

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[4] Nat'l R. R. Passenger Corp. v. Nat'l Association of R. R. Passengers, 414 U.S. 453 (1974).

[5] "The title of the act, repeated in that of each supplement, is general: 'An Act to Promote the Safety of Employees and Travelers,' etc.; and in the provisio to § 4 of the supplement of 1910

The second fundamental distinction, which relates primarily to rules of statutory construction, was well expressed in *Holloway* v. *Bristol-Myers Corp.*, 485 F.2d 986, 997 (D.C. Cir. 1973):[6]

> "Appellants contend that the courts should look not to the form of the statute but to the social objectives sought to be furthered by it, and they argue that only through private rights of action can meaningful consumer protection against fraud and deceptive advertising be achieved. Similar contentions have been relied upon in other cases. But in the case at bar this court's latitude for judicial constructs is limited. We are considering an Act in which ends and means, the social ends to be fostered and the administrative means of achieving those objectives, are inseparably interwoven into a unified and comprehensive statutory fabric. Both are the product of a legislative balance which took into account not only consumer protection but also interests of the businesses affected, with particular concern for tempered enforcement, the orderly development of commercial standards, and freedom from multiplicious litigation."

In the instant case it is difficult indeed to perceive any "latitude for judicial constructs". There is hardly a basis in the mere fact that SIPC can "sue and be sued" among its other general corporate powers. Nor can a private enforcement remedy be said to have been implied solely because of the broad purpose of the 1970 Act to protect customers. Most legislative enactments are intended for someone's benefit, but it hardly follows that benefitted persons for that reason alone become enforcers of congressional policy.

The Receiver emphasizes that the "expressio unius" maxim as applied in *Amtrak* "must yield to clear contrary evidence of legislative intent" (Rec. Brief, p. 18). That is precisely what *Amtrak* held (SIPC's Brief, p. 27), and SIPC contends that not only is such evidence entirely lacking here, but that the exclusivity of the Commission's section 7(b) remedy is the only reasonable conclusion which can be reached after appropriate analysis and reflection. Indeed, the utility of the "expressio unius" maxim in this case is really to fortify an otherwise ineluctable result rather than to serve as a tool for the resolution of doubt.

* * * * *

Only brief response need be made to the Receiver's argument in support of his standing.

Essentially the Receiver relies upon his order of appointment, emphasizing his duty to protect creditors including customers. That order, obtained at the instance of the Commission, did not purport in terms to authorize the Receiver

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there is a reservation as to 'liability in any remedial action for the death or injury of any railroad employee.' None of the acts, indeed, contains express language conferring a right of action for the death or injury of an employee: but the safety of employees and travelers is their principal object, and the right of private action by an injured employee, even without the employers' liability act, has never been doubted. (citing cases) A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Comyn's Dig. title, 'Action upon Statute' (F), in these words: 'So, in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.' (*Per* Holt, Ch. J., Anonymous, 6 Mod. 26, 27.) This is but an application of the maxim, *Ubi jus ibi remedium.* See 3 Bl. Com. 51, 123; Couch v. Steel, 3 El. & Bl. 402, 411, 23 L. J. Q. B. N. S. 121, 125, 2 C. L. R. 940, 18 Jur. 515, 2 Week. Rep. 170. The inference of a private right of action in the present instance is rendered irresistible by the provision of § 8 of the act of 1893 that an employee injured by any car, etc., in use contrary to the act, shall not be deemed to have assumed the risk, and by the language above cited from the proviso in § 4 of the 1910 act." 241 U.S. at 39-40.

[6] In *Holloway* the court refused to recognize a private remedy for violations of false advertising proscriptions in the Federal Trade Commission Act. It held that the Act vested the Commission with the exclusive right to correct violations.

to enforce creditors' rights against third persons not involving the property or rights of the corporation in receivership. Of course receivers are duty-bound to "protect" creditors, but SIPC has found no case in which that duty meant more than marshalling and preserving assets and choses in action *of the estate* for the benefit of creditors. Obviously, the purpose of a receivership such as this is to vest control in the court over the property and affairs of the subject firm, to the end that its responsibilities to creditors will be equitably discharged. This was a liquidating receivership which was ancillary to the Commission's injunction action under the federal securities laws.[7] A receiver is not the agent of any party to the litigation; he is an officer of the court. *Cf. United States* v. *Smallwood,* 443 F.2d 535 (8th Cir.), *cert. denied,* 404 U.S. 853 (1971).

No authority cited by the Receiver refutes the foregoing or supports his position. In *Davis* v. *Gray,* 83 U. S. (16 Wall.) 203 (1872), the receiver of a railroad brought suit to restrain an unlawful taking of the railroad's lands by the State of Texas. In *Booth* v. *Clark,* 58 U. S. (17 How.) 322 (1855), a receiver sought to recover funds held by the Secretary of the Treasury which were owed the firm in receivership. This Court's decision in *Caplin* v. *Marine Midland Trust Co. of N.Y.,* 406 U. S. 416 (1972), continues to appear controlling, and the Receiver's efforts to distinguish that case seem insubstantial. The decision dealt squarely with the powers of a receiver, and other considerations addressed by the Court were in response to arguments advanced by counsel.

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[7] *See, e.g.* Securities and Exchange Comm'n v. Bartlett, 422 F.2d 475 (8th Cir. 1970); Lankenau v. Coggeshall & Hicks, 350 F.2d 61, 63 (2d Cir. 1965); Esbitt v. Dutch-American Mercantile Corp., 335 F.2d 141 (2d Cir. 1964); Los Angeles Trust Deed & Mortgage Exchange v. Securities and Exchange Comm'n, 285 F.2d 162, 182 (9th Cir. 1960); Securities and Exchange Comm'n v. Fiscal Fund, Inc., 48 F. Supp. 712 (D. Del. 1943).

At the close of his brief, the Receiver stresses his earnestness in pressing this cause at the risk of being superseded by a trustee designated by SIPC. That is a risk he declined to invite for four months until he had substantially completed his work. Had he been as diligent right after his appointment when he was aware of the 1970 Act (SA 19), some of the serious complications which exist in this most unusual case might have been avoided.

CONCLUSION

The Commission's section 7(b) authority is the ultimate weapon in its arsenal of supervisory powers over SIPC. There is no basis for believing that Congress intended by implication to place in private hands a weapon with such potential for serious adverse effect on the public interest if improvidently used or brandished.

Respectfully submitted,

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No. 73-2055

In the Supreme Court of the United States

Supreme Court, U. S.
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OCTOBER TERM, 1974

SECURITIES INVESTOR PROTECTION CORPORATION,
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v.

JAMES C. BARBOUR, AS RECEIVER FOR GUARANTY
BOND AND SECURITIES CORPORATION AND GUARANTY
BOND COMPANY, INC., AND SECURITIES AND
EXCHANGE COMMISSION

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT*

REPLY BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

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The receiver has urged that the absence of an implied right of action would subvert a fundamental purpose of the Act—to provide financial relief for customers who incur losses as a result of financial difficulties of broker-dealer members of the Securites Investor Protection Corporation ("SIPC"). As evidence of this, he refers to "the Commission's demonstrated lack of enthusiasm for taking any affirmative action on behalf of Guaranty's customers other than the application for the appointment of a receiver" (Br. 19).

As we pointed out in our main brief (p. 10, n. 7), this was one of the first cases to arise under the Securities Investor Protection Act ("SIPA")[1], which was enacted and became effective on December 30, 1970, one week after the Commission brought suit against Guaranty Bond for violation of the Commission's "net capital" rule (17 C.F.R. 240.15c3-1) (App. 1). On January 29, 1971, in response to the Commission's request, the district court appointed a receiver for Guaranty Bond (App. 54-59). At that time it was unclear whether customers of Guaranty Bond were eligible for protection under the Act.

In response to a letter from the receiver, dated January 31, 1972, the Solicitor of the Commission requested by letter, dated February 10, 1972, "advice as to whether Guaranty Bond * * * did business with customers subsequent to December 30, 1970" (App. 66). After the receiver, on March 31, 1972, sought a determination by the district court regarding the applicability of SIPA (App. 19-27), the Commission advised the district court that it was (App. 63-64).

> of the view that SIPA coverage should not be withheld merely because the Commission filed this action prior to the effective date of SIPA, or because the firm was in net capital violation in 1970, since it appears that the firm continued to engage in the securities business until at least January 5, 1971. Action by SIPC is necessary, however, only if it appears that the firm will otherwise fail to meet its obligations to customers. There has been no demonstration that the customers of Guaranty Bond and Securities Corporation will in fact sustain any losses. In this connection, from information obtained from SIPC, it appears that the Receiver, as Receiver of Guaranty Bond and Securities Corporation, may have causes of action for damages or restitution against either the parent, Guaranty Bond Co., Inc., or against individual principals of the parent, which could redound to the benefit of the customers of Guaranty Bond and Securities Corporation.

In its Memorandum filed January 10, 1973 (App. 72-78), the district court rejected the Commission's contention with respect to the applicability of SIPA, although it stated, without having conducted an evidentiary hearing, that Guaranty Bond continued to do business for several days after the Act's effective date. Subsequently, the court of appeals agreed with the Commission's position as to the applicability of SIPA (App. 80-89).[2]

As pointed out in our main brief (p. 13, n. 11), we do not maintain that Congress intended that the protections of the Act might be arbitrarily withheld from customers of an insolvent broker-dealer whose claims cannot otherwise be satisfied. Should this Court hold that the receiver has no right of action against SIPC, the Commission will forthwith afford both the receiver and SIPC an opportunity to submit facts and arguments as to whether the Commission should, pursuant to Section

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[1] We also noted that the factual posture of this case is not likely to recur because a comprehensive reporting system has been developed (see our main brief, p. 10 n. 7).

[2] The question of the applicability of SIPA was presented in SIPC's petition for a writ of certiorari in this case. This court's grant of certiorari was limited to whether a private right of action may be implied under SIPA, and if so, whether a receiver of a member of SIPC has standing to maintain an action (App. 92).

7(b) of the Act, 15 U.S.C. 78ggg(b), apply to the United States District Court for the District of Columbia for an order requiring SIPC to discharge its obligations under the Act in this case.

Respectfully submitted.

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